Supreme Court, U.S.
FILED

(1)

No. 03 437 SEP 19 2003

In The
Supreme Court of the United States

ERIC I. EISEN,

Petitioner,

v.

JEFFREY BEARD, Commissioner of Corrections;
RAYMOND SOBINA, Warden, SCI Somerset,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the denial of a certificate of appealability ("COA") by the court of appeals was in direct contravention of the standards established by this Court in *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003), in that the lower courts denied a COA on the impermissible ground that petitioner would not prevail on the merits of the claims because the state court adjudication of the constitutional issues was not unreasonable under the provisions of 28 U.S.C. §2254(d)(1)(2).

2. Whether the denial of a COA was in error where the district court failed to consider newly discovered evidence that the prosecutor had deceived the petitioner with respect to the supposed benefits of the plea agreement in order to secure petitioner's waiver of his right to a jury trial, and where petitioner is barred from raising this claim in a successive petition.

3. Whether the denial of a COA was in direct contravention of the standards established by this Court in that petitioner made a substantial showing that his guilty plea was not voluntary or knowing, where the state trial court judge, a jurist of reason, vacated the guilty plea on these grounds, and where (a) petitioner was erroneously assured that under his plea agreement with the prosecution his life sentence would be commuted in 10-12 years, (b) the prosecutor unilaterally made a material change to the plea agreement, and (c) the prosecutor deliberately breached the plea agreement by secretly filing materials that contradicted the terms of the plea agreement.

PARTIES TO THE PROCEEDING

The petitioner is Eri[illegible] Eisen, the habeas petitioner in the courts below. The respondents are Jeffrey Beard, Commissioner of Corrections in Pennsylvnia and Raymond Sobina, Warden, State Correctional Instituiton at Somerset, Pennsylvania.

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OPINIONS BELOW

The Order of the Court of Appeals denying the Certificate of Appealability is reprinted in the appendix to this petition ("Pet. App.") at 1a. The order denying rehearing is set forth at 112a. The decision of the District Court and Magistrate Judge is reprinted at Pet. App. 3a.

STATEMENT OF JURISDICTION

The order denying the Certificate of Appealability was entered on February 24, 2003. Pet. App. 1a. A petition for rehearing was timely filed, and was denied on June 26, 2003. Pet. App. 112a. This petition is being filed within 90 days thereafter.

The Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides that no "state [shall] deprive any person of . . . liberty . . . without due process of law."

28 U.S.C. §2253(c)(2) provides that a "certificate of appealability may issue . . . if the applicant has made a substantive showing of the denial of a constitutional right."

STATEMENT OF THE CASE

This Petition seeks review of the denial by the Court of Appeals of a Certificate of Appealability ("COA") in a federal habeas corpus case. A panel of the Court of Appeals for the Third Circuit denied the COA on February 24, 2003, one day before this Court in *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003), provided substantially new standards and guidelines for determining whether a COA should issue. The decision of the Court of Appeals denying the COA stated only that "[f]or essentially the reasons set forth in the Magistrate Judge's January 10, 2002, Report and Recommendation, Appellant has failed to make a substantial showing of the denial of a constitutional right . . . " Pet. App. 1a. We will conclusively show that the reasons given by the Magistrate Judge cannot justify a denial of a COA under *Miller-El* as the Magistrate Judge denied relief not because petitioner did not state substantial constitutional claims, but rather under 28 U.S.C. §2254(d) on the finding that the Superior Court of Pennsylvania, in reversing the grant of a new trial, "reasonably" rejected Petitioner's claims.[1]

1. Petitioner was charged as an unarmed non-shooter in a felony murder. The death of the victim was accidental, but because it occurred in the commission of a felony, both participants in the event were charged with felony murder. Petitioner's counsel and the prosecutor negotiated a guilty plea to the felony murder charge (second degree murder in Pennsylvania), robbery and conspiracy. The negotiated plea would result in a life sentence.

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[1] A petition for rehearing from the February 24, 2003 Order Denying a Certificate of Appealability was denied without opinion or reasons on June 26, 2003.

Pet. App. 9a. As consideration for this plea, the prosecutor agreed to file a "Sentencing Exhibit" that would set forth the facts of the case as it related to petitioner's involvement. The purpose of the Sentencing Exhibit was to enhance petitioner's anticipated request for commutation which is the only means of parole from a life sentence in Pennsylvania. Pet. App. 9a-10a. Petitioner understood that the Sentencing Exhibit was critical to any commutation application. Further, based upon advice from his attorney, he believed that he would receive commutation after a period of some 10-12 years in custody. Based on these considerations, on May 23, 1994, petitioner entered a guilty plea to the specified charges.

2. Petitioner timely filed a post-conviction petition challenging his guilty plea in which he alleged that the plea was involuntary, that the prosecutor had deliberately violated the plea agreement by unilaterally changing the terms of the Sentencing Exhibit, and that his trial counsel was ineffective. With respect to the Sentencing Exhibit issue, Petitioner made two claims. First, that the prosecutor's last-minute crucial and detrimental changes in the agreement were made without petitioner's knowledge or approval. Petitioner had agreed to the following language submitted by the prosecutor as the correct statement of the facts: "What had occurred was that the victim was actually thrown into [co-defendant Smith], made contact with [Smith], and [when Smith] fell backwards, actually made contact with the ground, both with the butt of the gun and, I believe, his backside. [T]hat is how the gun discharged." R. 83-84.[2] However, just minutes before the

[2] R. ___ refers to the Reproduced Record in the Pennsylvania Superior Court.

plea proceeding, the prosecutor presented defense counsel with the following far less favorable language: "This caused Smith to lose his balance and fall backward *whereupon he discharged the fatal shot*." R. 75 (emphasis added). This change was not presented to the Petitioner.

Second, petitioner presented unrebutted testimony that in sentencing proceedings several months later involving the co-defendant Smith, the same prosecutor filed a Sentencing Exhibit without notice to petitioner or trial counsel. This exhibit included false and highly inflammatory information unfavorable to petitioner: that petitioner wanted Smith to kill the police officer who made the traffic stop which led to their arrest. Petitioner became aware of this stealth exhibit through his own post-conviction investigation nearly one year later.[3]

At the state PCRA hearing, trial counsel testified that the Smith Sentencing Exhibit was highly prejudicial to petitioner and would not have been accepted as part of the negotiated plea. In addition, *the prosecutor* admitted that this exhibit severely damaged petitioner's chances of commutation:

> Mr. Conrad [prosecutor]: A little bit [of a negative record], granted, was made in the sentencing

[3] At the PCRA hearing, the parties stipulated to statistical and documentary evidence from the Pennsylvania Board of Pardons and other officials which demonstrated that the Board reviews the files of all co-defendants when making a recommendation regarding commutation.

> exhibit of Jim Smith, could not be avoided. A little bit of it was made. *Now it's a horrible record.*

R. 553 (emphasis added).[4]

With respect to the representations made by defense counsel concerning commutation, Bernard Eisen, Esq., petitioner's father, testified that trial counsel advised him that petitioner would be eligible for commutation in 10 to 12 years. R. 324, 327-31, 341-43, 368. Had he known the facts about commutation of life sentences, petitioner "absolutely" would not have accepted the plea. R. 324-28.

Traci Rollins (petitioner's sister and a partner at a Florida law firm) took contemporaneous notes when she spoke with trial counsel shortly before the guilty plea proceedings. Trial counsel told her that the petitioner would be eligible for commutation in 10 to 13 years. R. 366-73. Bryan Amos, petitioner's brother-in-law and a member of the Academic Integrity Committee at the University of Pittsburgh Dental School, testified that petitioner understood he would be eligible for commutation in 10-12 years. R. 379. Petitioner testified that trial counsel advised him he would eligible for commutation in 10-12 years. A prison counselor testified that upon reaching prison, petitioner stated that he would be commuted within 10-12 years. Trial counsel conceded that there were discussions concerning commutation, but that he could not

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[4] In a televised interview, the prosecutor also made clear that he intended to deceive petitioner regarding the worth of his own Sentencing Exhibit. See *infra*, at 10-11.

recall making any specific time period representations. Pet. App. 110a.[5]

The PCRA trial court vacated the plea. The court determined that the Sentencing Exhibit was an integral part of the plea agreement. Pet. App. 107a-111a. Further, while the court observed that there was a dispute about trial counsel's exact advice regarding the time petitioner could expect to serve before he would be eligible for commutation, it resolved the dispute in favor of a new trial:

> [I]n light of the subsequent testimony this court heard and the observations made of the various witnesses . . . it is this court's conclusion that the court erred when it did not comply strictly with Rule 319(b) [Rule of Criminal Procedure requiring full colloquy on guilty plea] and do a thorough and complete colloquy as to Mr. Eisen's on the record understanding of precisely what it was he was to receive. The purpose of the rule 319(b) is to insure that all terms of the quid pro quo are openly acknowledged on the record.

Pet. App. 111a.

3. On appeal, the Superior Court of Pennsylvania reversed the order for a new trial. The court did not dispute the fact that there was no disclosure of the terms of the plea agreement as contained in the Sentencing Exhibit (and therefore no colloquy on these terms), but

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[5] In advising petitioner to accept the plea agreement, counsel failed to come to terms with the fact that commutation is virtually nonexistent under current practices and procedures. Indeed, the PCRA trial court determined that petitioner would not receive "any relief [commutation] for at least several decades." Pet. App. 112a.

ruled that the terms of the agreement were immaterial to the plea. Pet. App. 105a.

On December 1, 1998, the Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal. Pet. App. 95a.

4. Petitioner filed a Petition for Writ of Habeas Corpus in the District Court for the Western District of Pennsylvania. The case was referred to Magistrate Judge Kenneth J. Benson who wrote a Report and Recommendation denying the Petition. Pet. App. 6a. On the issue of whether the plea was entered knowingly and intelligently, the Magistrate Judge ruled that the Superior Court order reversing the grant of a new trial was not an "unreasonable" application of federal constitutional principles.

With respect to the claim that the prosecutor made last minute changes to the Sentencing Exhibit, the Magistrate Judge concluded that since the Sentencing Exhibit did not prohibit changes, the prosecutor had the right to make unilateral changes. With respect to the claim that the prosecutor had undermined petitioner's Sentencing Exhibit, the Magistrate Judge ruled that the negative information about petitioner that was included in the co-defendant's proceedings was not precluded by the plea agreement and that no prejudice was shown, as the Board of Pardons would not likely review these records when petitioner sought commutation.

Finally, on the ineffectiveness of counsel claim, the Magistrate Judge ruled that since there was no breach of the plea agreement, counsel could not have been ineffective in not contesting the changes to the Sentencing Exhibit. The district court denied a COA.

5. Petitioner then sought a COA in the court of appeals. On February 24, 2003, the COA was denied (on the grounds set forth by the Magistrate Judge on the merits of the habeas petition). Pet. App. 1a. A Petition for Rehearing was denied on June 26, 2003. Pet. App. 112a.

REASONS FOR GRANTING THE WRIT

A. The Reasons Provided by the Lower Courts for Denying the COA – That the State Court Determination of the Constitutional Issues Were Not Unreasonable under 28 U.S.C. §2254(d) – Were Expressly Rejected by this Court in *Miller-El v. Cockrell*, 123 U.S. 1029 (2003)

The court of appeals denied the COA, stating that "[f]or essentially the reasons set forth in the Magistrate Judge's . . . Report and Recommendation, Appellant has failed to make a substantial showing of the denial of a constitutional right." Pet. App. 1a. This ruling was made one day before this Court's decision in *Miller-El*, a case that provides significant guidance on the standards for issuing a COA. *Miller-El* made clear that the court must not deny a COA based on its views of the ultimate merits of the case under the AEDPA standards for habeas review. The deference that the court might ultimately give to a state court ruling should play no part in the COA determination. Rather, the issue is whether the petitioner has made a "substantial showing of a denial of a

constitutional right." Under this standard, the COA must issue in this case.[6]

In *Miller-El*, this Court declared that on a request for certificate of appealability, the "court of appeals should limit its examination to a threshold inquiry into the underlying merits of [the] claims ... [and that a petitioner] need only demonstrate a substantial showing of the denial of a constitutional right." 123 S.Ct. at 1034. This approach is quite different from the analysis on the merits, where the habeas court gives broad deference to state court fact findings (§2254(d)(2)) and must deny the writ if the state court decision was not an "unreasonable" application of clearly established federal law. §2254(d)(1).[7] By distinct contrast, the threshold inquiry on appealability, "does not require full consideration of the factual or legal bases ... of the claims. *In fact, the statute forbids it.*" *Id.* at 1039 (emphasis added). The Court ruled that a "COA can be supported by *any* evidence demonstrating [the constitutional violation]." *Id.* at 1041 (emphasis added). Thus, as long as the petitioner presents evidence that supports the constitutional claim that could be believed by a "jurist of reason," the COA should issue. *Id.* at 1034. *Miller-El* reversed the denial of a COA because the court of appeals accepted the state court fact findings as a basis for determining that no constitutional claim was stated.

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[6] A petition for reconsideration of the denial of the COA was denied on June 26, 2003.

[7] The PCRA trial court, based on three days of hearings, determined that the petitioner had been denied his right to a jury trial.

As noted, the court of appeals panel determined that "[f]or essentially the reasons set forth in the Magistrate Judge's . . . Report and Recommendation, Appellant has failed to make a "substantial showing of the denial of a constitutional right . . . " But the Magistrate Judge's Report ignores the PCRA trial court findings; further, it is based on a determination under §2254(d) that the Pennsylvania Superior Court fact findings were justified and that the decision of the Superior Court was not an unreasonable application of federal constitutional principles. We disagree with these rulings, but that is a matter for the argument on the merits. Stripped of that analysis, there can be no question but that substantial constitutional claims have been stated. Indeed, under the test of whether a "jurist of reason" could find for petitioner, in this case the trial PCRA judge, a jurist of reason (who initially accepted the guilty plea) found for petitioner on a view of the facts and law that conclusively meets the standard for a COA as determined by this Court.

B. The District Court Failed to Consider Newly Discovered Evidence that the Prosecutor had Intentionally Deceived Petitioner with Respect to the Significance of the Sentencing Exhibit

There is disturbing evidence – based on events that occurred during the habeas proceedings – that the prosecutor *intended* to deceive petitioner with respect to the worth of the Sentencing Exhibit. During a February 11, 2000 newscast, it was disclosed that the prosecutor had informed the victim's family that "there would be no way that [the petitioner] would get out of jail." *See* Petitioner's Motion To Introduce Portions of Videotaped Newscast.

In a February 25, 2000 TV interview, the prosecutor repeated this assertion:

Reporter:	But if you were so intent on keeping them in prison, why would you sign the sentencing exhibit for their future clemency?
Prosecutor Conrad:	You want to know something, I didn't think it would ever mean anything in the world.

Id.

The Commonwealth did not respond to Petitioner's Motion and the Magistrate Judge did not rule on this relevant evidence. This itself is error and mandates the issuance of a COA.[8] Petitioner is limited to one habeas petition and is entitled to full consideration of all issues properly presented. Furthermore, the statements make plain that the former prosecutor was not dealing honestly with the petitioner in the plea negotiations.[9] As he declared, the Sentencing Exhibit was worthless as a basis for commutation in a case where commutation is the only

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[8] A key provision of the Superior Court reversal of the PCRA trial court's grant of a new trial was based on its conclusion that the "record is devoid of any evidence in support of Appellee's argument he was deceived, misled or misinformed with respect to the sentencing exhibit." Pet. App. 105a.

[9] These televised statements were of a piece of erratic behavior that led to his conduct being investigated by Special Prosecutor Richard Sprague (Pittsburgh Post-Gazette 7/30/99) and his dismissal by the District Attorney's Office (Pittsburgh Post-Gazette1/5/98).

means of release on a life sentence. Petitioner was deliberately misled into giving up his right to a jury trial, all in violation of settled law. *See, Machibroda v. United States*, 368 U.S. 487 (1962). Plea negotiations must not be a swindle, as they were here. If the Superior Court had been aware of the duplicitous action of the prosecutor in providing a worthless sentencing exhibit in return for petitioner giving up his constitutional right to a trial and accepting a life sentence without parole, it might not have reversed the PCRA trial court.

C. Petitioner Presents a Substantial Claim That the Guilty Plea Was Not Entered Knowingly, Intelligently or Voluntarily Where The Prosecutor Deliberately Breached the Plea Agreement

A guilty plea must be voluntary, knowing and intelligent to satisfy the requirements of the Due Process Clause. *Santobello v. New York*, 404 U.S. 257; *Meyers v. Gillis*, 93 F.3d 1147 (3d Cir. 1996), *after remand*, 142 F.3d 664 (3d Cir. 1998). On the facts as advanced by petitioner (and credited by the state trial court), he believed that he would receive commutation within a 10-12 year period as part of his plea agreement with the prosecutor.

The Magistrate Judge ruled that even if petitioner was informed by his counsel that he would receive commutation in the 10-12 year period, under AEDPA, the Superior Court opinion denying relief was not an "unreasonable" application of federal constitutional principles. Pet. App. 76a-78a. But as we have shown, under *Miller-El* the only relevant inquiry is whether there is substance to the constitutional claim. Moreover, even under AEDPA, the due process violation is manifest: a plea entered to second degree murder which carries a sentence

of life imprisonment without parole is not voluntary, intelligent or knowing if the defendant has been erroneously promised by his lawyer that his sentence will be commuted in 10-12 years or any term of years.

In *Meyers v. Gillis*, 142 F.3d 664, the Third Circuit granted habeas relief in indistinguishable circumstances. In *Meyers*, the defendant had also entered a plea of guilty to second degree murder, with a mandatory life sentence. Meyers asserted that he had entered the plea based upon assurances that he would be eligible for parole (where, under state law, his only route to release was by commutation). The court granted the writ, ruling that counsel was ineffective for providing erroneous advice concerning parole and release prospects on a life sentence for second degree murder. Of course, to find ineffectiveness the court had to determine that the erroneous advice concerning parole rendered the plea not knowing or intelligent. Here, petitioner was informed that he would receive commutation within a specific time period and his counsel was likewise ineffective. Further, the trial PCRA court determined that its failure to make inquiry into the plea agreement left petitioner with this misunderstanding.[10]

Miller-El requires *some evidence* to support the claim that petitioner was misled as to commutation prospects. At the PCRA hearing, petitioner and members of his family and an unrelated prison officer testified that petitioner was told that he would be commuted in 10-12 years. On

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[10] The Magistrate Judge did not distinguish *Meyers* or suggest that it did not fully support petitioner's due process claims. Rather, he ruled that the state court had not made an "unreasonable application" of clearly established law.

this evidence, the trial PCRA court, charged with making the factual determination regarding the circumstances surrounding the plea, found that it "is abundantly clear that subsequent to this plea there was a great deal of confusion as to precisely what Mr. Eisen was to receive. It is plain to this court that under the unique facts in this plea agreement it was error on the part of the court not to get . . . Mr. Eisen's understanding of what he was receiving." Pet. App. 111a.

There would be no need for additional colloquy at the plea proceeding if confusion did not exist at the time. If the advice provided left petitioner misinformed or, as the trial PCRA court found, with a "great deal of confusion" about the consequences of the plea, the plea was not knowingly or intelligently entered.

The Magistrate Judge also ruled that the changes to the Sentencing Exhibit did not invalidate the plea on the ground that the plea negotiations did not preclude such unilateral changes by the prosecutor and that the change was not material. The Magistrate Judge failed to properly analyze the contract and due process issues presented. A plea agreement is contractual in nature, but due process concerns necessitate special rules:

> The government may not rely upon a rigid and literal construction of the terms of a plea or cooperation agreement. *Nolan-Cooper*, 155 F.3d at 236. Such agreements are unique and are to be construed in light of special due process concerns." *United States v. Bradbury*, 189 F.3d 200, 206 (2d Cir. 1999) (internal quotes omitted). Courts must determine whether the government's conduct was inconsistent with what was reasonably understood by defendant when entering the plea of

guilt. *United States v. Badaracco*, 954 F.2d 928, 939 (3d Cir. 1992); *Bradbury*, 189 F.3d at 206.

United States v. Baird, 218 F.2d 221, 229 (3d Cir. 2000)

Petitioner had agreed to language in the Sentencing Exhibit that described the shooting as accidental. Just before the plea was entered, the prosecutor changed this language and, as the Magistrate Judge recognized, petitioner did not agree to this change. Pet App. 39a-42a. The fact that his attorney may have agreed to the change is irrelevant; the critical issue is whether petitioner assented to the change. *See Houmis v. United States*, 558 F.2d 182, 186 (3d Cir. 1977) (the issue of "highest importance" is whether the defendant himself agreed to the interpretation of the plea agreement and not whether his attorney agreed to such interpretation). Here, there was no meeting of the minds, the change which raised serious questions about the accidental nature of the shooting was material, and therefore there was no valid plea agreement.

In rejecting petitioner's claim that the prosecutor's filing of a severely prejudicial Sentencing Exhibit in related proceedings was a breach of the plea agreement, the Magistrate Judge did not dispute petitioner's central claim: that the Smith Sentencing Exhibit "varied markedly" from petitioner's and that the prosecutor deliberately sought to undermine the essence and purpose of the Sentencing Agreement by placing facts on the record that would destroy any chances that petitioner would have for commutation. Rather, the Magistrate Judge rejected the claim on the grounds (1) that the placing of an unproved, highly negative allegation concerning petitioner in co-defendant Smith's Sentencing Exhibit was not precluded by the terms of the plea agreement and (2) that petitioner

failed to prove prejudice in that the Board of Pardons would not likely review the Smith records on an application for commutation by petitioner. Pet. App. 53a; 55a-60a.

Where a prosecutor fails to comply with the terms of a plea agreement or engages in conduct that undermines or contradicts the plea agreement (even inadvertently) the defendant is entitled to a new trial. *See Dunn v. Colleran*, 247 F.3d 450, 456-57 (3d Cir. 2001) (granting habeas relief even where prosecutor's statements contradicting plea agreement were made with no "ill will"; relief is mandated regardless of whether the prosecutor's statements had any influence or impact on the actual sentence imposed); *United States v. Nolan-Cooper*, 155 F.3d, at 235-236 (same).

Moreover, prejudice is apparent. Petitioner presented proof that the Board of Pardons would inevitably consider the Smith Sentencing Exhibit. *See* 61 P.S. §331.19 (empowering the Board of Probation and Parole to conduct investigations and gather records and sentencing information regarding inmates). Both Sentencing Exhibits were specifically designed for consideration in the commutation process. They supplanted the pre-sentence report by providing the official nature and circumstances of the offense and, therefore, would be considered and evaluated by the Parole Board. In turn, the Parole Board would provide the Board of Pardons with the information contained in the Sentencing Exhibits.

CONCLUSION

Miller-El has imposed important new standards on COA determinations. Applying these standards, petitioner presents substantial constitutional questions on which jurists of reason have already disagreed. The petitioner has clearly met the standard for a COA. This Court should grant certiorari, order that Certificate of Appealability issue, and remand the case to the Court of Appeals.

Respectfully submitted,

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APPENDIX

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January 9, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **02-2230**

ERIC I. EISEN,

Appellant

vs.

MARTIN HORN; ET AL

(W.D. PA. CIV. NO. 99-CV-01624)

Present: NYGAARD, FUENTES and STAPLETON, *CIRCUIT JUDGES*

Submitted are:

(1) Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(2) Appellees' memorandum of law in opposition thereto; and

(3) Appellant's reply

in the above-captioned case.

Respectfully,

Clerk

MMW/JDM/tyw

ORDER

The foregoing request for a certificate of appealability is denied. For essentially the reasons set forth in the Magistrate Judge's January 10, 2002, Report and Recommendation, Appellant has failed to make a "substantial showing of the denial of a constitutional right" on any of

the claims raised in his habeas petition. *See* 28 U.S.C. § 2253(c)(2).

By the Court,
/s/ _____
Circuit Judge

Dated: **FEB 24 2003**

tyw/cc: DR, JBL, CMR, RMW, RDS.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ERIC I. EISEN, Petitioner, v. MARTIN HORN, Commissioner of the Pennsylvania Department of Corrections; and RAYMOND SOBINA, Warden, State Correctional Institution of Somerset, Respondents.	)	Civil Action No. 99-1624 Judge Gary L. Lancaster Magistrate Judge Benson

MEMORANDUM ORDER

Petitioner's petition for writ of habeas corpus was received by the Clerk of Court on October 1, 1999, and was referred to United States Magistrate Judge Kenneth J. Benson for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Local Rules 72.1.3 and 72.1.4 C.

The magistrate judge's report and recommendation, filed on January 9, 2002, recommended that the petition for writ of habeas corpus be dismissed and that a certificate of appealability be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on counsel for petitioner and counsel for respondents by first-class mail on January 9, 2002. On January 23, 2002, petitioner's motion for an enlargement of time to file objections was granted (Docket #50). Objections were filed by petitioner on March 8, 2002 (Docket #51). After *de novo* review of the pleadings and documents

in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 4th day of April, 2002;

IT IS HEREBY ORDERED that the petition for writ of habeas corpus is dismissed.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated January 9, 2002 (Docket #49), is adopted as the opinion of the court.

/s/ Gary L. Lancaster
GARY L. LANCASTER
UNITED STATES
DISTRICT JUDGE

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ERIC I. EISEN, Petitioner, v. MARTIN HORN, Commissioner of the Pennsylvania Department of Corrections; and RAYMOND SOBINA, Warden, State Correctional Institution of Somerset, Respondents.	)	Civil Action No. 99-1624 Judge Gary L. Lancaster Magistrate Judge Benson

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Petition for Writ, of Habeas Corpus (Docket #1) be dismissed. It is further recommended that a certificate of appealability be denied.

II. REPORT

Eric I. Eisen has filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 wherein he presents the following claims for review.

1. The prosecutor's breach of the plea agreement rendered petitioner's guilty plea unknowing and involuntary and was therefore unlawfully induced.

2. The guilty plea was not knowingly or intelligently entered.

3. Counsel's ineffectiveness rendered petitioner's plea involuntary, unknowing and unintelligent for the following reasons:

   A. failure to investigate and/or advise petitioner of viable defenses;

   B. failure to object to the prosecution's crucial, last minute alteration to the sentencing exhibit;

   C. failure to independently research the most recent information available regarding the eligibility of life prisoners for commutation when that information formed the foundation of the plea agreement; and

   D. advising petitioner to surrender his cherished trial rights and be sentenced to life imprisonment without parole in exchange for an illusory expectation of gubernatorial clemency.

A. Relevant Factual and Procedural History[1]

Sometime in early February of 1993, petitioner, Eric Eisen, and another individual, James Smith, decided to "rip off" another individual named Daniel Bostedo, who

[1] Copies of the relevant documents that contain petitioner's procedural history are included as attachments to respondents' answer at Docket Numbers 17, 18, 19, 20 and 21. Petitioner filed an index of his reproduced record at Docket No. 29.

was known to them as a small time drug dealer. Eisen and Smith planned that Eisen would arrange a meeting with Bostedo and a fictitious drug supplier in order for Bostedo to purchase narcotics. The plan was that Smith would hide himself in the trunk of Eisen's car, Eisen would meet Bostedo and drive him to a secluded area for the meeting, Eisen would release the trunk lid of his car as he and Bostedo exited the car to meet the fictitious drug dealer, and Smith would appear and steal Bostedo's money. Eisen and Smith estimated that Bostedo would have about $6,000.00 in cash on his person in order to purchase the fictitious narcotics.

In accordance with their plan, Bostedo was contacted on Sunday, February 8, 1993, and arrangements were made to meet outside a bar in the east end of Pittsburgh. Eisen drove his vehicle to the bar to pick up Bostedo while Smith hid in the trunk with a shotgun. Eisen picked up Bostedo and drove him to a secluded place in North Fayette Township. Eisen released his trunk lid and got out of his vehicle with Bostedo and headed toward a residence on the secluded road. At that point, Smith, carrying the shotgun, approached Eisen and Bostedo and attempted to rob Bostedo. When Bostedo realized what was happening, he tried to hide behind Eisen, who pushed him into Smith. Allegedly, Smith lost his balance and fell backward, which caused the shotgun to discharge, hitting Bostedo and killing him. Bostedo's body was loaded into Eisen's trunk and Eisen and Smith attempted to leave the area. In the meantime, the North Fayette Township Police Department received a telephone call reporting a gunshot. An officer responding to the call noticed Eisen's vehicle turning off of a dirt road at a high rate of speed. When the officer turned on his lights, Eisen pulled over to the side of the road and

stopped his car. The officer approached the vehicle and noticed blood smears on the trunk and on Eisen's and Smith's clothes. He ordered Eisen and Smith out of the vehicle and Eisen informed him that a dead body was in the trunk. In the trunk, the officer discovered Bostedo's fully-clothed body and a twelve-gauge, Mosper, pump-action shotgun with one spent round; $4,000.00 cash was discovered in one of Bostedo's socks. Eisen and Smith immediately were taken into police custody where each gave detailed statements concerning the incident.

Subsequently, Eisen was charged with one count of criminal homicide under 18 Pa. Cons. Stat. § 2501(a) at criminal complaint no. CC 9302685, and two counts of criminal conspiracy under 18 Pa. Cons. Stat. § 903(a)(1) and one count of robbery under 18 Pa. Cons. Stat. § 3701 (a)(1)(iv) at criminal complaint no. CC 9304232.

William F. Manifesto, Esquire, was retained as counsel for petitioner; deputy district attorney Christopher Conrad represented the Commonwealth in the prosecution of petitioner. After several meetings, Manifesto and Conrad negotiated a plea agreement that was accepted by petitioner. The agreement provided that petitioner would plead guilty to second degree murder, robbery and conspiracy and receive a life sentence; no further penalty would be imposed at the charges of robbery and conspiracy and one count of conspiracy would be dismissed. As consideration for the plea agreement, the Commonwealth agreed to execute a "sentencing exhibit," which would be filed as part of the record of the case. The sentencing exhibit was intended to document the relevant facts of the crime in a light most favorable to Eisen as well as record the Commonwealth's position that it would support subsequent

consideration of any request for commutation of petitioner's sentence.

Petitioner's guilty plea hearing was scheduled for May 23, 1994 in the Court of Common Pleas of Allegheny County. On that date, just prior to the hearing, prosecutor Conrad requested a meeting with defense counsel Manifesto to discuss certain language changes he had made in the sentencing exhibit. Mr. Manifesto reviewed the changes with Conrad and then proceeded with petitioner's guilty plea hearing. At the hearing, petitioner tendered pleas of guilty to one count each of murder in the second degree, robbery, and criminal conspiracy. The tendered pleas were accepted and petitioner was sentenced on the same date to the mandatory sentence for second degree murder – life imprisonment; no further sentence was imposed at the remaining charges.

Petitioner filed no motion to withdraw his plea; neither did he file a direct appeal from the judgment of sentence. Rather, on December 28, 1995, petitioner filed a petition for relief pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9543, in which he made what amounts to twenty-nine claims of error.[2]

> A. Ineffective assistance of counsel which, in the circumstances of this particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place, 42 Pa.C.S.A. § 9543 (a) (2) (ii), (3) (iii) and (4); in that:

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[2] *See* Motion for Post-Conviction Relief (Docket #17, Exhibit 16).

1. counsel unlawfully induced defendant to plead guilty to second degree murder, and to be sentenced to life imprisonment without parole, when defendant was facing no greater penalty on the criminal homicide count if he proceeded trial, by:

   a. misadvising defendant that he had no defense when no facts existed which formed the corpus delicti of the robbery and, therefore, the felony-murder;

   b. misadvising defendant that he had no defense when facts tended to prove that defendant did not intend to commit robbery, a statutory predicate offense to felony-murder, but that he only intended to commit a "scam," "rip-off" or theft-by-deception, which is not a predicate offense to felony murder, thereby establishing a defense to second degree murder;

   c. misadvising defendant that he had no defense when facts appeared of record at the plea hearing to establish a defense to second degree murder in that defendant was not the shooter and the killing of the victim by the co-defendant was accidental in that the co-defendant shooter did not pull the trigger, rather the butt of the gun hit the ground causing the gun to accidentally discharge and, therefore, the killing was not "in furtherance of the underlying felony," which is an essential element of second degree murder;

d. misadvising defendant and his family that if defendant accepted the Commonwealth's sentencing exhibit and pled guilty he would be considered for gubernatorial clemency and commutation of sentence in 10-12 years; otherwise he would not be considered for clemency for at least 20 years, if at all;

e. misadvising defendant and his family that the Commonwealth's tender of a sentencing exhibit to the trial court after the plea had been entered, which "documented" what took place at the plea hearing for clemency consideration in the future, was valuable consideration offered in exchange for a plea to life imprisonment without parole, and would substantially influence a gubernatorial clemency decision; and

f. misadvising defendant to accept essentially worthless consideration from the Commonwealth (the tender of said sentencing exhibit) in exchange for his plea to life imprisonment without parole.

2. Counsel was ineffective by failing to review with defendant immediately prior to entering his guilty plea to second degree murder, robbery and conspiracy, the final Commonwealth revisions to the sentencing exhibit which contained a last minute day of sentencing crucial change to the prior draft of the sentencing exhibit which was agreed to by defendant. The

final sentencing exhibit was not what defendant reviewed and agreed to accept; the material change further eroded the sentencing exhibit's value and meaning; and the material change was unquestionably a breach of the plea agreement by the Commonwealth. Had defendant been made aware of the material change to the sentencing exhibit, he would have rejected the plea agreement and proceeded to trial.

3. Counsel was ineffective for failing to object to the Commonwealth's last minute day of sentencing crucial change to the sentencing exhibit and for allowing the exhibit to be tendered to the court in a substantially altered form from that agreed to by defendant which constituted a breach of the plea agreement by the Commonwealth.

4. Counsel was ineffective for permitting the prosecutor to change a crucial statement of fact made on the record by co-defendant's counsel, John Zagary, at the sentencing hearing before the Honorable Paul G. Letty.

5. Counsel was ineffective for failing to recognize the significance of the change to the sentencing exhibit and for failing to communicate the change to defendant, since the accidental discharge of the gun without the codefendant pulling the trigger eliminates an essential element of felony-murder, a killing "in furtherance of the conspiracy."

6. Counsel was ineffective for failing to object to the derailment by the prosecutor of the trial court's attempt to review the sentencing exhibit, in open court in compliance with the court's obligations under Pa.R.Crim.P. 319(b).

7. Counsel was ineffective for failing to object to the trial court's failure to comply with Pa.R.Crim.P. 319(b), which required the court to conduct a thorough inquiry into the terms of a plea agreement and to ascertain whether a defendant fully understands and concurs in the terms of the agreement.

8. Counsel was ineffective for failing to file a timely motion to withdraw the guilty plea or to file a timely direct appeal challenging the substantial defects which occurred during the plea colloquy in violation of Pa.R.Crim.P. 319(b).

B. Defendant's plea of guilty was unlawfully induced where the circumstances make it likely that the inducement caused him to plead guilty, 42 Pa.C.S.A. § 9543 (a) (2) (iii), (a) (3) (iii) and (4), in that:

1. defendant would not have plead [sic] guilty to second degree murder, which carries a sentence of life imprisonment without parole, when he was facing no greater sentence had he proceeded to trial, but for counsel's ineffective advise [sic] that he had no defense available in his case when:

a. the facts of record at the plea hearing were silent as to the corpus delicti of the robbery and, therefore, the felony-murder, as there was no evidence of an attempt to take money from the victim and thousands of dollars were found on the victim after the killing;

b. the facts indicated that defendant did not intend to commit a robbery, but only that he intended to commit a theft-by-deception; and

c. the facts of record established a defense to second degree murder because defendant was not the shooter and the killing of the victim by the co-defendant was accidental in that the co-defendant shooter did not pull the trigger and did not kill "in furtherance of the underlying felony," an essential element of second degree murder.

2. Defendant would not have pled guilty but for counsel's ineffective advise [sic] that defendant would be eligible for gubernatorial clemency and commutation of sentence in 10-12 years if he pled guilty and accepted the Commonwealth's sentencing exhibit; otherwise he would not be considered for clemency for at least 20 years, if at all.

3. Defendant would not have pled guilty but for counsel's ineffective advice that the sentencing exhibit was valuable consideration offered in exchange for a plea

to life imprisonment without parole and that the sentencing exhibit would substantially influence a gubernatorial clemency decision.

4. Defendant would not have pled guilty had counsel informed him of the last minute, day of sentencing crucial material change to sentencing exhibit made by the Commonwealth immediately prior to the entry of his guilty plea.

5. Defendant would not have pled guilty had he been made aware of the Commonwealth's breach of the plea agreement by its material change of the sentencing exhibit.

6. The guilty plea colloquy was defective and in violation of Pa.R.Crim.P. 319(b), because:

   a. the colloquy failed to present a factual basis (corpus delicti) for robbery and felony-murder;

   b. the trial court failed to conduct a thorough inquiry into the terms of the plea agreement and failed to ascertain whether defendant fully understood the terms (including the sentencing exhibit) of the plea agreement and concurred in the terms of the plea agreement;

   c. the trial court was derailed and led astray by the prosecutor and, therefore, failed to conduct an on-the-record review of the sentencing exhibit which, as admitted by the

prosecutor, was "the only consideration" offered in exchange for defendant's plea to life imprisonment without parole.

C. A violation of the provisions of the constitution, law or treaties of the United States which would require the granting of federal habeas corpus relief to a state prisoner, 42 Pa. C.S.A. §9543 (a) (2)(v), where:

1. Defendant was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel when counsel failed to advise him of the chimerical nature of the plea agreement; failed to object to the Commonwealth's last minute critical change to the sentencing exhibit; and failed to object to the defective plea colloquy, all of which caused defendant to unknowingly, unintelligently and involuntarily enter a plea of guilty.

2. Defendant was denied due process of law pursuant to the Fourteenth Amendment when the Commonwealth breached the plea agreement by making a last minute, day of sentence, material change to the sentencing exhibit which was the sole consideration offered in exchange for defendant's plea to life imprisonment without parole.

The PCRA court held hearings on July 19 and 20, 1996, and on November 14, 1996. On December 31, 1996, the PCRA court issued an order granting petitioner's prayer for post-conviction relief under 42 Pa. Cons. Stat. § 9543 (a) (2) on the basis of its determination that it had failed to conduct an adequate plea colloquy in accordance

with former Pa. Rule Crim. Proc. 319(b). On January 21, 1997, the Commonwealth filed a timely notice of appeal to the Superior Court of Pennsylvania from the PCRA court's order. On February 14, 1997 the PCRA court filed its opinion in support of its December 31, 1996 order.

On June 12, 1997 the Commonwealth-appellant filed its 60-page brief in support of its appeal wherein it raised the following "issue" for review.

> 1. The PCRA court erred in ruling that appellee was entitled to a new trial when the court did not, nor could not find, that William Manifesto, Esquire, gave ineffective assistance of counsel when Mr. Manifesto took the best course of action for his client and appellee received the benefit of the plea bargain.
>
>   A. Mr. Manifesto had an objectively reasonable strategy for his actions.
>
>   B. Appellee failed to demonstrate actual outcome determinative prejudice.[3]

In response, petitioner filed a brief for appellee wherein he urged affirmance of the PCRA court based on the issues contained in his PCRA petition. On May 19, 1998, the Superior Court of Pennsylvania vacated the order of the PCRA court and reinstated the judgment of sentence.[4] On June 2, 1998, petitioner filed a motion for reargument in the Superior Court en banc, which, on July 30, 1998 the Superior Court denied. Thereafter, on August

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[3] Commonwealth Exhibit 39 (Docket #18).

[4] Commonwealth Exhibit 62 (Docket #21).

31, 1998, petitioner filed a petition for allowance of appeal in the Supreme Court of Pennsylvania presenting the following issues:

1. The Superior Court's failure to grant relief, where the undisputed facts show the prosecutor breached the plea agreement, is based on a profoundly flawed assumption, conflicts with precedent of the Supreme and Superior Courts of Pennsylvania, and results in manifest injustice to petitioner and damage to the integrity of the plea bargaining process.

2. The trial court properly ruled that it had failed to conduct the required colloquy under Rule 319(b) concerning an undisclosed written plea agreement and that the plea was invalid.

3. Superior Court did not address the following alternative grounds for PCRA relief and for affirmance of the PCRA Court compelled by the record evidence:

   A. Counsel was ineffective for failing to object to the prosecution's alteration of the sentencing exhibit, failing to independently research the information available regarding the eligibility of life prisoners for commutation, and in failing to recognize available defenses.

   B. Federal habeas corpus relief in the nature of withdrawal of guilty plea is mandated.

By order dated December 1, 1998 the Supreme Court of Pennsylvania denied petitioner's petition for allowance of appeal.

B. Exhaustion Requirement

The provisions of the federal habeas corpus statute at 28 U.S.C. § 2254 (b) require a state prisoner to exhaust available state court remedies before seeking federal habeas corpus relief. To comply with the exhaustion requirement, a state prisoner first must have fairly presented his constitutional and federal law issues to the state courts through direct appeal, collateral review, state *habeas* proceedings, *mandamus* proceedings, or other available procedures for judicial review. *See, e.g., Burkett v. Love,* 89 F.3d 135, 137 (3d Cir. 1996). The petitioner has the burden of establishing that exhaustion has been satisfied. *Ross v. Petsock,* 868 F.2d 639, 643 (3d Cir. 1989).[5]

The first element of the exhaustion requirement is the "fair presentation" of claims to the state courts. To satisfy this requirement, the same factual and legal bases for a claim must be presented to the state court; the state must have a reasonable opportunity to address the claim and correct any violation of federal rights. *Duncan v. Henry,* 513 U.S. 364 (1995) (per curiam). *See also Chaussard v. Fulcomer,* 816 F.2d 925, 928 (3d Cir.) ("Fair presentation requires that, before a particular claim may be asserted in

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[5] Exhaustion is not a jurisdictional limitation, however, and federal courts may review the merits of a state petitioner's claims prior to exhaustion when no appropriate state remedy exists. *Christy v. Horn,* 115 F.3d 201, 206 (3d Cir. 1997); *Doctor,* 96 F.3d at 681; *Carter v. Vaughn,* 62 F.3d 591, 594 (3d Cir. 1995). In addition, the amended Habeas Corpus Statute provides that a federal court may deny a petitioner's claims on the merits notwithstanding a petitioner's failure to comply with the exhaustion requirement. 28 U.S.C. § 2254(b) (2) (as amended by The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 142 Cong. Rec. H3305-01 (1996).

federal court, the same method of analysis must have been made available to the state court."), *cert. denied,* 484 U.S. 845 (1987).

The second component of the exhaustion requirement requires a petitioner properly to present his claims to the state's trial court, intermediate appellate court and highest court in accordance with the procedural requirements as may be established under state law. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."). Exhaustion does not require that the highest court rule on the merits of a petitioner's claims; it does, however, require that the court be given the opportunity to review them. Id; *Lines v. Larkins,* 208 F.3d 153, 160 (3d Cir. 2000).

Respondent argues that petitioner has failed to exhaust state remedies as to the claims he makes here. There is no doubt that petitioner fairly presented the legal and factual bases for all the claims he is asserting here in his PCRA petition, which he presented to the trial court, the Court of Common Pleas of Allegheny County. Petitioner also presented those claims to the superior Court of Pennsylvania in his Brief for Appellee, which he filed in response to the Commonwealth's appeal.[6] Petitioner presented his habeas claims to the Supreme Court of Pennsylvania (the highest court) in his petition for allowance of appeal, which he filed in response to the Superior

[6] Commonwealth Exhibit 48 (Docket #20).

Court's order vacating the judgment of the PCRA court.[7] Respondent does not dispute the fact that petitioner "fairly presented" his claims to the requisite Pennsylvania courts. Respondent's argument, rather, is that petitioner has procedurally defaulted his claims because he did not "properly" present them to the Pennsylvania state courts.

Beyond the question of exhaustion, a federal court may be precluded from reviewing claims under the "procedural default doctrine." *Gray v. Netherland,* 518 U.S. 152 (1996); *Coleman v. Thompson,* 501 U.S. 722, 732 (1991); *Doctor,* 96 F.3d at 678; *Sistrunk v. Vaughn,* 96 F.3d 666, 678 (3d Cir. 1996). Like the exhaustion requirement, the procedural default doctrine was developed to promote and protect our dual judicial system. The doctrine is based upon the "independent and adequate state law grounds" doctrine, which dictates that federal courts will not review a state court decision involving a question of federal law if the state court decision is based on state law that is "independent" of the federal question and "adequate" to support the judgment. *Coleman v. Thompson,* 501 U.S. at 750. The Supreme Court explained the rationale for the doctrine as follows.

> When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the judgement on direct review. In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.

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[7] Commonwealth Exhibit 65 (Docket #21).

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal court would be able to do in habeas what the Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Coleman v. Thompson, 501 U.S. at 730-731 (*citations omitted*).

A state's procedural rules may constitute an independent and adequate state law ground for denial of federal review of habeas claims under the procedural default doctrine. *Id.*; *Sistrunk,* 96 F.3d at 673. Moreover, violations of a state's procedural rules may constitute an independent and adequate state ground sufficient to invoke the procedural default doctrine even where no state court explicitly has concluded that a petitioner is procedurally barred from raising his claims. *Glass v. Vaughn,* 65 F.3d 13, 15 (3d Cir. 1995), *cert. denied,* 516 U.S. 1151 (1996); *Carter,* 62 F.3d at 595. A petitioner whose constitutional claims have not been addressed on the merits due to procedural default can overcome the default, thereby allowing federal court review, if he or she can demonstrate either: 1) "cause" for the default *and* "actual prejudice" as a result of the alleged violation of federal law; or 2) failure to consider the claims will result in a "fundamental miscarriage of justice." *Coleman,* 501 U.S. at 750; *Carter,* 62 F.3d at 595.

Respondent's procedural default argument is based upon procedural rules promulgated in the Pennsylvania Rules of Appellate Procedure and the decisional law interpreting those rules. We are directed, in particular, to Pa.R.App.P. 903, which establishes that, as a matter of Pennsylvania law, a party who seeks to challenge an order of a trial court must file a separate appeal or cross appeal. Respondent argues that petitioner did not properly present his claims to the Superior Court of Pennsylvania because he failed to file a cross appeal from the PCRA court's order in accordance with Rule 903(b).[8]

Respondent supports its argument by asserting that "it is settled law that an appellee may not raise issues on appeal that were not raised by the appellant except by filing a cross appeal."[9] Respondent next claims that in its appeal from the PCRA court's order the Commonwealth raised only one issue for review concerning ineffective assistance of counsel. Respondent further asserts that, although it filed a 60-page brief in support of its appeal, this issue "is a very narrow one and strictly based upon the PCRA (as amended 1988), which required that, upon a finding that a guilty plea was unlawfully induced (42 Pa.C.S.A. § 9543 (A) (2) (iii)), the PCRA Court [must] also

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[8] Pennsylvania Rule of Appellate Procedure 903(b) provides as follows.

> (b) Cross appeals. Except as otherwise prescribed in Subdivision (c) of this rule, if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

[9] Respondent's Response, p.5 (Docket #34).

find '[t]hat the failure to litigate the issue prior to or during trial or on direct appeal could not have been the result of any rational strategic or tactical decision by counsel,' 42 Pa.C.S.A. § 9543(a)(4)."[10] Respondent argues that, because most of the issues raised by petitioner in his Brief for Appellee and in his petition for allowance of appeal had nothing to do with the one issue advanced by the Commonwealth-appellant, petitioner waived those claims by failing to assert them in a separate cross appeal from the PCRA order.

Respondent's argument to the contrary notwithstanding, there is no procedural default here for several reasons. First, a review of respondent's 60-page brief reveals that respondent in fact addressed many of the issues argued in petitioner's brief for appellee. More importantly, however, is that the settled procedural law in Pennsylvania is that *only aggrieved* parties must file a cross appeal in order to preserve an issue for appellate review. *See, e.g., Commonwealth v. Poindexter,* 484 Pa. 472, 475, 399 A.2d 390, 391 (Pa. 1979) (holding that Commonwealth's failure to appeal *the adverse ruling* of the Court of Common Pleas that the trial evidence was legally insufficient waived such claim on appeal) (emphasis added); *Pennsylvania Human Relations Commission v. Chester Housing Authority,* 458 Pa. 67, 72 n.12, 327 A.2d 335, 338 n.12 (1974) ("By not taking an appeal from the order of the Commonwealth Court, the Authority is precluded from raising issues decided adversely to it by that court."), *cert. denied,* 420 U.S. 974 (1975); *Sateach v. Beaver Meadows*

[10] Respondent's Response, p. 6 (Docket #34).

Zoning Hearing Board of Appeals, 676 A.2d 747, 751 (Pa. Commw. 1996) (Board's failure to file cross-appeal waived issue regarding trial court's holding that appellant did not violate the zoning ordinance by operating a tire center on the premises); *Township of Concord v. Concord Ranch, Inc.,* 664 A.2d, 640, 650 (Pa. Commw. 1995) (stating that a party who seeks *to challenge* a trial court order should file a cross appeal) (emphasis added), *reargument denied* (Oct. 3, 1995); *Arcidiocacono v. Timeless Towns of the Americas, Inc.,* 363 Pa. Super. 528, 531 n.2, 526 A.2d 804, 806 n.2 (1987) (appellee's failure to file cross-appeal waived allegation that trial court erred in charging jury on contributory negligence).

Every case cited by respondent applied the Pennsylvania waiver rule *only to issues that were adversely decided* against the party that failed to file an appeal. None of the cases cited by respondent, and no cases discovered by this court, applied the waiver rule to a party that failed to appeal a *favorable* ruling in the lower court. Nor has this court discovered any Pennsylvania cases that have applied the waiver rule where the lower court granted relief on one claim but declined to address other issues raised by the party below.

Respondent further attempts to support its argument by relying on the rule that an appellate court can affirm a lower court's order on any legal basis. The argument here must be that because an appellate court can affirm on any ground, there was a duty on petitioner to present the appellate court with all those alternative grounds, *by way* of a *cross appeal.* This argument simply overlooks the fact that in *no way* was the petitioner an aggrieved party: the order of the PCRA court granted the relief he sought, and

not one of his other arguments was ruled upon far less denied.

It is well settled federal law that violation of a state rule of procedure will constitute a default sufficient to prevent federal habeas corpus review only where that rule of procedure is *consistently and regularly applied. Banks v. Horn,* 126 F.3d 206, 211 (3d Cir. 1997) (quoting *Johnson v. Mississippi,* 486 U.S. 578, 588-89 (1988)). The United States Court of Appeals for the Third Circuit has explained that "[a] state rule provides an independent and adequate basis for precluding federal review of a state prisoner's habeas claims *only* if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions." *Doctor v. Walters,* 96 F.3d 675, 683-84 (3d Cir. .1996) (emphasis added), *rehearing in banc denied* (Nov. 4, 1996).

Respondent's claim of procedural default would require this court to find that Pennsylvania procedural law requires a party to file a cross appeal from a favorable judgment whenever suggests the judgment could be affirmed on grounds other than, or in addition to, those raised by the aggrieved party in its appeal from its adverse judgment. Respondent has failed to demonstrate that Pennsylvania law even contains such a rule, much less one that "speaks in unmistakable terms." In fact, it appears that Pennsylvania procedural law might contain the opposite rule. *See, e.g., Township of Montgomery v. Market Center Realty Co.,* 317 A.2d 317, 318 n.2 (Pa. Commw. 1974) ("Although the decision of the court below was not based on this issue, it was properly raised by Appellee herein as an additional reason to sustain the

result reached by Judge Cirillo"). Thus, respondent has failed to establish any Pennsylvania procedural rule that is "adequate" to support its default argument.

Moreover, respondent has failed to show that the Pennsylvania state appellate courts refused to review petitioner's claims on the merits based on any "independent" procedural rule. Indeed, the Superior Court's holding provided as follows.

> We reverse the PCRA court's award of a new trial based, *not upon the Commonwealth's ineffective assistance of counsel argument but, upon the statutory and decisional law applicable to post-conviction relief in Pennsylvania.* Nevertheless, the appellee's ineffective assistance of counsel claim is without merit.

Sup. Ct. Op. p.3 (emphasis added). Thus, it does not appear that the court relied on any procedural rule when it vacated the judgment of the PCRA court. In fact, the court did not even base its decision on the "narrow" issue that the Commonwealth relied in its appeal. Finally, respondent cannot show that "the state courts' refusal in this instance is consistent with other decisions" because there was no state court refusal to hear petitioner's claims. Thus, respondent has failed to demonstrate that federal habeas review of petitioner's claims is foreclosed by the procedural default doctrine.

C. Standard of Review

Section 2254 of the federal habeas corpus statute announces the standard for federal court review of state court criminal determinations. 28 U.S.C. § 2254. Specifically,

a federal court must accord a presumption of correctness to a state court's factual findings, which presumption a petitioner can rebut only by clear and convincing evidence. 28 U.S.C. § 2254(e). Where a state court's factual findings are not made explicit, a federal court's "duty is to begin with the [state] court's legal conclusion and reason backward to the factual premises that, as a matter of reason and logic, must have undergirded it." *Campbell v. Vaughn,* 209 F.3d 280, 289 (3d Cir. 2000). In determining what implicit factual findings a state court made in reaching a conclusion, a federal court must infer that the state court applied federal law correctly. *Id.* (citing *Marshall v. Lonberger,* 459 U.S. 422, 433 (1982)).

A federal court may not issue the writ unless it concludes that the state court's adjudication resulted in a decision that was "contrary to," or an "unreasonable application of," clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Recently, in *Williams v. Taylor,* 529 U.S. 362 (2000), Justice O'Connor, writing the opinion of the Court in Part II, discussed the independent meanings of the "contrary to" and "unreasonable application" clauses contained within section 2254(d)(1).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from

> this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 411-13.

The Supreme Court further clarified that a federal habeas court making the unreasonable application inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. *Id.* at 409. "Under §2254(d)(1)'s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. These standards apply also to mixed questions of fact and law, such as whether trial counsel provided effective assistance of counsel. *Werts v. Vaughn,* 228 F.3d 178, 204 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 1621 (2001).

In addition, in *Appel v. Horn,* 250 F.3d 203, 210 (3d Cir. 2001), the United States Court of Appeals for the Third Circuit held that where the state court fails to adjudicate or address the merits of a claim raised by the petitioner, the reviewing court does not apply AEDPA's deferential standards. In such an instance, the federal habeas court must conduct a *de novo* review of pure legal questions and of mixed questions of law and fact in the way a court would have done prior to the enactment of AEDPA. However, the state court's factual determinations are still presumed to be correct, rebuttable upon a showing by clear and convincing evidence. *Id.*

Petitioner's claims will be reviewed in accordance with the standards described above.

D. The Commonwealth's Alleged Breach of the Plea Agreement

The court first considers petitioner's claims that the Commonwealth breached the plea agreement. Petitioner contends that the prosecutor breached the plea agreement in two ways: a) by the last-minute changes to Eisen's sentencing exhibit; and b) by including within co-defendant Smith's sentencing exhibit highly inflammatory information that was unfavorable to Eisen.[11]

A defendant's plea of guilty amounts to a waiver of valuable constitutional rights. As with such waiver, the Due Process Clause of the United States Constitution requires that a guilty plea be made "knowingly, voluntarily and intelligently." *Boykin v. Alabama,* 395 U.S. 238 (1969). The constitutional standard is one that asks whether the plea represents a voluntary[12] and intelligent[13] choice

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[11] Eisen raises this issue in his habeas petition as follows:

> On February 13, 1995, nine months after petitioner's [i.e., Eisen's] plea and sentence, Conrad filed a sentencing exhibit in co-defendant Smith's file without notice to petitioner or trial counsel. Smith's exhibit included unsubstantiated and highly inflammatory information most unfavorable to petitioner and in breach of the plea agreement. In fact, the Smith exhibit, signed by Mr. Conrad, contained unreliable and self-serving hearsay from Smith, who had a prior record of assault on a federal officer, that petitioner wanted Smith to kill the police officer who made the traffic stop which led to their arrest. Petitioner became aware of the stealth exhibit through his own post-conviction investigation nearly one year after the exhibit[']s filing.

Habeas Petition ("HP") at p. 15.

[12] A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving or because he has such an incomplete understanding of the

(Continued on following page)

among the alternative courses of action open to the defendant. *Id.* at 243. A defendant has no absolute right to withdraw a guilty plea, once it has been entered. *United States v. Isaac,* 141 F.3d 477, 485 (3d Cir. 1998). A plea of guilty entered by one fully aware of the direct consequences of doing so must stand unless it was induced by threats, misrepresentation, or improper promises. *Mabry v. Johnson,* (1978) 467 U.S. 504, 509 (1984). *Cf. United States v. Hyde,* 520 U.S. 670, 674 (1997) (a guilty plea is a grave and solemn act, not to be entered into, or withdrawn, lightly).

Additional considerations come into play when a plea is the result of a plea agreement between the state and the defendant. In *Santobello v. New York,* 404 U.S. 257, 262 (1971), the Supreme Court set forth the following governing principles that apply to plea agreements made by the prosecution.

> [The disposition of criminal charges through plea bargaining] presuppose[s] fairness in securing agreement between an accused and a prosecutor. . . . The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." . . .

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charge that his plea cannot stand as an intelligent admission of guilt. *Henderson v. Morgan,* 426 U.S. 637, 645 n. 13 (1976).

[13] In order for a plea to qualify as "intelligent," a criminal defendant must receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith v. O'Grady,* 312 U.S. 329, 334, (1941).

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello, 404 U.S. at 261-262.

The Supreme Court reinforced these principles in *Mabry v. Johnson,* 467 U.S. 504, 509 (1984) wherein it acknowledged that "a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." (Citations omitted.)

A claim that the government has violated a plea agreement presents a question of law. *United States v. Baird,* 218 F.3d 221, 229 (3d Cir. 2000). In assessing such a claim, the federal courts construe plea agreements according to contract principles. *See United States v. Nolan-Cooper,* 155 F.3d 221, 236 (3d Cir. 1998); *United States v. Isaac,* 141 F.3d 477, 483 (3d Cir. 1998); *United States v. Moscahlaidis,* 868 F.2d 1357, 1361 (3d Cir. 1989). And our Court of Appeals has gone further:

> [t]he government may not rely upon a rigid and literal construction of the terms of a plea or

> cooperation agreement. Such agreements are unique and are to be construed in light of "special due process concerns." Courts must determine whether the government's conduct was inconsistent with what was reasonably understood by defendant when entering the plea of guilt. In view of the government's tremendous bargaining power, we will strictly construe the text against it when it has drafted the agreement.

Baird, 218 F.3d at 229 (internal quotes omitted). Thus, not only are the actual terms of the agreement relevant to a determination of the question of breach, also relevant to this inquiry is what the criminal defendant reasonably understood to be the terms of the agreement. *United States v. Nolan-Cooper,* 155 F.3d 221, 235 (3d Cir. 1998) ("In determining whether the plea agreement has been breached, courts must determine 'whether the government's conduct is inconsistent with what was reasonably understood by the defendant when entering the plea of guilty.'") (quoting *United States v. Badaracco,* 954 F.2d 928, 939 (3d Cir. 1992)).

One seeking to prove a breach of a plea agreement must first establish the terms of the agreement. *See United States v. Bogusz,* 43 F.3d 82 (3d Cir. 1994). In *Bogusz,* the Court of Appeals explained that "Courts use a three-step analysis to review plea bargains: first, they determine the agreement's terms and the conduct alleged to violate it; second, they determine if the conduct violated the plea agreement; and third, if the plea agreement is violated, they determine the remedy." *Id.* at 94. *See also Moscahlaidis,* 868 F.2d at 1360 (cases alleging breach of plea agreements present three questions, the first of which is "what are the facts of the case, i.e., what are the terms

of the agreement and the conduct of the government"). Moreover, it is petitioner's burden to establish, by a preponderance of the evidence, the terms of the plea agreement and that the plea agreement has been breached. *See United States v. Huang,* 178 F.3d 184, 187 (3d Cir. 1999); *United States v. Conner,* 930 F.2d 1073, 1076 (4th Cir.), *cert. denied,* 502 U.S. 958 (1991). Finally, "the government is held only to those promises that it actually made to the defendant." *See, e.g., United States v. Peglera,* 33 F.3d 412, 413 (4th Cir. 1994).

1. Conrad's Last Minute Changes to the Sentencing Exhibit

In his petition, petitioner first asserts that Assistant District Attorney Christopher Conrad breached the plea agreement by making last minute changes to the sentencing exhibit that was filed as part of his record. In this regard, petitioner has explained that the purpose of the sentencing exhibit was to provide a record that would maximize his chance for potential release through gubernatorial clemency, his only avenue of release after imposition of a term of life in prison, the mandatory sentence for murder of the second degree. It was petitioner's understanding that the sentencing exhibit would provide a recitation of the facts of the crimes in the light most favorable to petitioner and also would include the Commonwealth's position that it supported clemency consideration for petitioner.

Petitioner's plea hearing was scheduled for May 23, 1994, in the Court of Common Pleas of Allegheny County before the Honorable Lawrence O'Toole. Prior to this date, petitioner had reviewed a copy of the sentencing exhibit prepared by Mr. Conrad and agreed to the language

therein. In the sentencing exhibit reviewed and agreed to by petitioner, the death of Daniel Bostedo was described as an accidental shooting that occurred when the butt end of the gun hit the ground and accidentally discharged a bullet that hit Mr. Bostedo in the neck killing him instantly. Specifically, the draft sentencing agreement (hereinafter referred to as the "draft") provided, in relevant part, as follows.

> Everything went according to the plan until the point when James Smith approached the victim. In the victim's effort to get away or resist he was shot by James Smith and died from a single gunshot wound to the neck. At Smith's Plea and sentencing, his attorney described the shooting as relayed to him by his client. He stated that when the victim saw Smith with the gun he attempted to hide behind the [sic] Eisen who pushed him away. In so doing, he pushed the victim into Smith. This caused Smith to lose his balance and fall backward. The butt of the gun hit the ground as he fell causing it to discharge the fatal shot. The trajectory of the shot appeared to be consistent with this description. The deceased was loaded into Mr. Eisen's trunk.[14]

On the morning of the day set for petitioner's hearing, Mr. Manifesto met with petitioner and his family. Petitioner and all other involved persons were waiting for the conclusion of another matter then underway in Judge O'Toole's courtroom. During this period, Mr. Conrad approached Mr. Manifesto and asked to meet with him to discuss changes to the sentencing exhibit. At that point,

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[14] Appendix to Petition, pp. 29-30 (Docket #2).

Manifesto and Conrad went to Conrad's office to discuss the sentencing exhibit.[15] Specifically, Mr. Conrad changed the sentencing exhibit (final) as follows.

> Everything went according to the plan until the point when James Smith approached the victim. In the victim's effort to get away or resist he was shot by James Smith and died from a single gunshot wound to the neck. At Smith's Pleas [sic] and sentencing, his attorney described the shooting as relayed to him by his client. He stated that when the victim saw Smith with the gun he attempted to hide behind the [sic] Eisen who pushed him away. In so doing, he pushed the victim into Smith. This caused Smith to lose his balance and fall backward *whereupon he discharged the fatal shot.* [The butt of the gun hit the ground as he fell causing it to discharge the fatal shot.] The trajectory of the shot appeared to be consistent with this description. The deceased was loaded into Mr. Eisen's trunk.[16]

Mr. Manifesto reviewed the changed language and made no objections to the revisions. All then returned to Judge O'Toole's courtroom and petitioner's plea proceeding. At the hearing, petitioner pleaded guilty pursuant to the terms of the agreement and immediately thereafter was sentenced to life imprisonment without the possibility of parole.

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[15] Testimony of William Manifesto, PCRA Hearing Transcript November 15, 1996, p. 28.

[16] *Id.* at p. 34.

In his petition, Eisen claims that he was unaware that the sentencing exhibit filed with his record was different than the one that he had reviewed and agreed to prior to his plea colloquy hearing. In his traverse, petitioner complains about the change as follows:

> he [i.e., Eisen] believed that the sentencing exhibit would embody language that the killing was an accident. He reviewed a draft of the exhibit which included language that the butt of the gun hit the ground causing it to discharge. Petitioner stated [in his testimony at the PCRA hearing] that this specific language was important to him. (R. 396). He also testified that although he saw counsel leave the courtroom with Mr. Conrad, he was never told that the sentencing exhibit was changed nor was he aware of the change when he entered his plea. Most importantly, petitioner stated that he would have refused to plead guilty had he been made aware of the change. He also stated that had the judge reviewed the revised sentencing exhibit in open court, he would have rejected the plea and gone to trial. (R. 402).

Traverse at p. 8.

It appears that petitioner's claim that Conrad breached the plea agreement by changing the language of the sentencing agreement is twofold. First, it appears that Eisen is claiming that he understood one of the terms of his plea agreement to be that there would be no changes to the sentencing exhibit that he had approved and that the sentencing exhibit which he approved would be the sentencing

exhibit that would be filed.[17] Second, it appears that Eisen is claiming that the controlling term of the plea agreement was that his sentencing record would be "sanitized," *i.e.*, the sentencing exhibit would cast the facts in a light favorable to Eisen, for purposes of eventual commutation and that the sentencing exhibit which he approved accomplished that sanitization whereas the sentencing exhibit as changed by Conrad did not. *See* HP at p. 14 ("In exchange for petitioner's guilty plea to life imprisonment, Mr. Conrad agreed that the state court record would reflect facts in this case that would enhance petitioner's chance for gubernatorial commutation.").

As noted above, the relevant inquiry for the court is this: 1) what did the government promise Eisen in the plea agreement and what did Eisen reasonably understand that promise to be; and 2) was the government's conduct inconsistent with the terms of the agreement and with

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[17] Support for this view of Eisen's argument is found in Commonwealth Exhibit No. 42, Eisen's Answer and Objection to the Commonwealth's Motion for Leave to Present Oral Argument in the Superior Court wherein Eisen states that "the 'deal' [*i.e.*, the plea bargain] Mr. Eisen understood to have been negotiated between him, through trial counsel, and the Commonwealth was not the 'deal' actually presented to the [Sentencing] Court, because the sentencing exhibit that was *supposed* to have been *filed by the Commonwealth* was not the exhibit *actually* filed[.]" In addition, Eisen's father testified that "if there was any significance [sic] change to be made to the contract [*i.e.*, sentencing exhibit] the other party to the contract must be made AWARE of it. . . . " Post Conviction Hearing Transcript, 7/18/96-7/19/96 at p. 144 (Hereinafter "PCRA H.T.1 at ___"). Eisen's father testified that he was under the impression that the sentencing exhibit he reviewed with Manifesto the morning of the plea proceedings, which did not include the challenged change subsequently made by Conrad, was the final document. PCRA H.T.1 at p. 165.

what Eisen reasonably understood when he tendered his plea of guilty.

Accepting the petitioner's invitation to read closely and construe narrowly all the words that constitute the agreement between himself and the commonwealth, the court must conclude that the argument does not go his way. On this record, petitioner has failed to establish that there were any terms of the plea agreement that forbade making any changes to the sentencing exhibit he reviewed; neither does the record contain any evidence that petitioner reasonably expected that the draft of the sentencing exhibit he reviewed would be the same sentencing exhibit as filed. Moreover, given the testimony of record, it does not appear that Eisen reasonably could have expected that there would be no difference between the sentencing exhibit he reviewed and the final version that would be filed of record with the court. Indeed, to the extent there is *any* evidence in the record on this point, it tends to support the notion that Eisen expected there were going to be changes to the draft he reviewed.

In this respect, during the week prior to the plea hearing, the draft sentencing exhibit was reviewed by petitioner and his father, who is himself an attorney. HP at p. 26. Eisen's father testified that, on the draft exhibit that he and Eisen reviewed, he added in handwriting three terms that he had wanted to be changed in the sentencing exhibit that Eisen had reviewed, including, *inter alia,* that Eisen was not in possession of a weapon. PCRA H.T.1 at 134-37. Eisen testified that he reviewed the suggested changes made by his father. *Id.* at p. 198. Of course, these changes were proposals only, because the Commonwealth must still have been provided the opportunity to accept,

reject or modify them. This evidence, such as it is, contradicts any claim that Eisen was not aware that changes were possible in the sentencing exhibit, or that the draft's immutability was somehow a term of his plea agreement.

Moreover, even if Eisen subjectively held a belief that there would be no additional changes, nowhere in the record does it appear that belief was communicated to the Commonwealth; without a communication to the Commonwealth of Eisen's asserted belief, the court cannot conclude that Conrad's conduct in changing the sentencing exhibit amounted to a breach of the agreement or that Eisen's unexpressed belief that there would be no change was reasonable under the facts. This is especially so in light of the facts that the changes were not furtively made, but rather were communicated to Mr. Manifesto, Eisen's counsel. If there had been a term of the plea agreement that no changes would be made to the sentencing exhibit reviewed by Eisen, surely Manifesto would have objected when Conrad brought those changes to his attention. The parties do not disagree that Manifesto informed Eisen's father that some changes had been made to the sentencing exhibit; they dispute, though, whether Manifesto informed petitioner either that the sentencing exhibit had been changed or what the nature of the change was. But these matters go to the issue of whether Manifesto was ineffective, not whether Conrad breached the agreement. As the record stands, there is no evidence that Conrad's changing of the sentencing exhibit breached any of the terms of the plea agreement.

In the absence of an express term in the plea agreement forbidding changes to the sentencing exhibit, petitioner's "breach of contract" argument must be that Conrad's late change to the sentencing exhibit was a

violation of the Commonwealth's duty of good faith and fair dealing. *See United States v. Ahn,* 231 F.3d 26, 35-36 (D.C. Cir. 2000) ("as in all contracts, plea agreements are accompanied by 'an implied obligation of good faith and fair dealing.'" [*United States v.*] *Jones,* 58 F.3d [688] at 692 [(D.C. Cir. 1995)]. Here, however, Eisen was represented by counsel, and Conrad did disclose the change to Eisen's counsel. In the absence of a term of the plea agreement that no changes would be made to the sentencing exhibit, and the record discloses no support for the notion there was such a term, petitioner can point only to this as evidence of a breach of the duty of good faith and fair dealing: 1) the timing of the change; and 2) the changes themselves. In this respect, it is important to note that the change Eisen complains of is not the only change made by Conrad to the sentencing exhibit.[18] In fact, the pattern of

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[18] Some of the changes between the sentencing exhibit Eisen reviewed and the sentencing exhibit as filed are highlighted below. (Items that had been deleted from the sentencing exhibit as reviewed by Eisen are in ~~strikeout~~, items that were added into the sentencing exhibit as filed that were not in the sentencing exhibit as reviewed by Eisen are in **bold**:)

> In summary, an Agreement ha~~s~~**d** been reached between he and James Smith that they would attempt to "scam" or "rip off" Daniel Bostedo. . . . Smith was to ~~appear and utilize~~ **use** the gun to rob the victim. **Eisen was unarmed**. Everything went according to the plan until the point when James Smith approached the victim. In the victim's effort to get away or resist he was shot by James Smith and died from a single gunshot wound to the neck. At Smith's plea and sentencing, his attorney described the shooting as relay~~t~~ed to him by his client. He states that when the victim saw Smith with the gun he attempted to hide behind Eisen who pushed him away. In so doing, he pushed the victim ~~into~~ **toward** Smith. This caused Smith to lose his balance and fall backward. ~~The butt of the gun hit the ground as he fell causing it~~

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changes does not support a claim that Conrad acted in bad faith in making the change complained of. One of the changes Conrad added was to emphasize that Eisen was unarmed, as Eisen's father had suggested. Both the changes themselves and the timing of the changes taken together are not evidence sufficient to support a conclusion that Conrad's actions were in bad faith.

If the alterations to the sentencing exhibit were material changes, or if the prosecutor thought them to be material, it might conceivably be the case that there was a duty to provide notice of them well in advance of the plea hearing. It is hard to know, however, how much notice might have been required. Is there a sliding scale of some sort, with so much notice required for one change, more required for multiple changes? Or does the law require ten hours notice, or two days, or a week, for any change at all? Of course the law makes no such rule. We look to all the facts. It is clear the prosecutor did not deem the changes to be material.[19] Manifesto, too, testified that he did not

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~~to discharge the fatal shot.~~ **whereupon he discharged the fatal shot**. The trajectory of the shot appeared to be consistent with this description. . . .

It is the ~~intent~~ **request** of this office that **due to his actions during these criminal proceedings that** serious consideration be given Eric Eisen at the point of any clemency request. Such consideration, of course, must take into account Mr. Eisen's continued rehabilitative adjustments in the institution.

[19] *See* PCRA H.T.2 at p. 97 ("that change is not a material change."). *Id.* at 101 ("There is no material change in that sentencing exhibit. There is nothing in the evidence to indicate that the Commonwealth, the D.A.'s office did that surreptitiously or anything else. It was relayed to the defense counsel in this case that there was no doubt. There is some question as to whether it was related to Mr. Eisen or to

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consider the changes made by Conrad material. In the context of a question posed by Conrad to Manifesto regarding the change in the language regarding the butt of the shotgun hitting the ground, the following exchange took place "Q. . . . when that [sentence] was changed and you reviewed it prior to coming back down here for the entry of the plea, did you, as Mr. Eisen's attorney, find it to be a material change? A. I didn't believe it was material to a point where I would have refused to accept and plea.". *See* PCRA H.T.2 at p. 22. Not only does the record reveal that neither Conrad nor Manifesto thought the changes were material, but a fair reading of both versions of the sentencing exhibit compels the reader to the same conclusion. The language of the draft and of the final version is, of course, different. But an objective reader must understand that both versions convey the sense that the killing of Bostedo was an accident after Smith "los[t] his balance and fell backward."

The court concludes that neither the changes to the sentencing exhibit themselves, nor the notice given to counsel amounted to a breach of the plea agreement or to a breach of the Commonwealth's duty of good faith and fair dealing.

In all events, Conrad had another duty: to do nothing that would defeat the objective of the sentencing agreement. *See Livingstone v. North Belle Vernon Borough,* 91 F.3d 515, 525-26 (3d Cir. 1996) ("This term follows from the duty of good faith and fair dealing, Restatement

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Eric, and I suggest to you that it really doesn't make any difference because it's not a material change.").

(Second) of Contracts § 205 (1981), and that duty's correlative obligation not to act so as to defeat an agreement's objective."). To the extent that Eisen is arguing that Conrad's change in the sentencing exhibit defeated he objective of the plea agreement by contaminating what was to be a sanitized record, the court understands this argument to be that Conrad breached the plea agreement by defeating the objective of the plea agreement.

In order for a court to set aside a bargained-for plea of guilty, any alleged breach must be material to the agreement. *See Rodriguez v. New Mexico,* 12 F.3d 175, 175 (10th Cir. 1993) (citation omitted) ("[o]nly material breaches of a plea agreement provide a basis for a court to determine that a plea was involuntary."). In determining what constitutes a material breach, the courts have applied:

> the general contract law principle that a "breach is not material unless the non-breaching party is deprived of the benefit of the bargain. The less the non-breaching party is deprived of the expected benefits, the less material the breach." *United States v. Castaneda,* 162 F.3d 832, 838 (5th Cir. 1998). Further, this Circuit has defined material breach by comparing it with the converse concept of substantial performance, stating that "if a party's 'nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance,' the breaching party has substantially performed under the contract, and the non-breaching party is not entitled to recission." *Id.* at 838-39.

United States v. Castro, 118 F.Supp.2d 711, 712-713 (E.D.La. 2000). The materiality of a term is evaluated by an objective standard. *Rodriguez v. New Mexico,* 12 F.3d at 175. Thus, in examining a claim of breach, the court must

use objective standards to determine the disputed terms of a plea agreement and must decide whether the government's actions were inconsistent with what the defendant reasonably understood when he entered his guilty plea. *United States v. Crusco,* 536 F.2d 21, 27 (3d Cir. 1976) (applying the teachings of *Santobello*).

Here, both Eisen and the Commonwealth agree that the primary purpose of the plea agreement was to create a sanitized record for purposes of providing a record that might support favorable action on a request for gubernatorial clemency in the future.[20] The changes in the sentencing exhibit as filed from the draft reviewed by Eisen simply do not amount to a material breach. If the plea agreement was, as the parties now characterize it, an agreement for a sanitized record, the changed language did not render the record unsanitized. Contrary to Eisen's assertions, see PCRA H.T.1 at p. 26, the changed language does not cause the sentencing exhibit to characterize the shooting as intentional, rather than accidental. "The last minute change to the [Eisen sentencing] exhibit replaced language indicating that the gun accidentally discharged when it hit the ground, with language indicating that the co-defendant pulled the trigger and intentionally discharged the fatal shot." Traverse at p. 8. The complained-of sentence in the final version reads as follows: "This caused Smith to lose his balance and fall backward whereupon he

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[20] *See* Traverse at pp. 5-6 ("However, the Smith exhibit, which included an unsubstantiated statement that petitioner urged Smith to kill the police officer who made the traffic stop which resulted in their arrest, contaminated the record and destroyed whatever commutation value was to [be] gained by the plea and the 'sanitized' record.").

discharged the fatal shot." This sentence ultimately conveys the notion that the shooting was accidental, especially when it is read, as it must be, in context.

It cannot be forgotten, as petitioner seems sometimes to do, that the sentencing exhibit was never intended to portray him as innocent, or as a victim himself. Petitioner was, after all, pleading guilty to Murder of the Second Degree. The evidence was overwhelming that petitioner actively engaged in the planning of a robbery, undertook to commit it, and that the victim was shot and killed in the course of it. No reasonable jury, properly charged, could have failed to convict. Petitioner's sole hope to avoid life in prison lay in an eventual pardon. Accordingly, he and the Commonwealth bargained for and agreed that a statement would be entered in the record that would plainly depict petitioner as guilty of the crime, but would recount the facts in a light, such as it is, most favorable to him. Further the Commonwealth would express its support of eventual clemency. The sentencing exhibit does these things. If the plea agreement were for a sentencing exhibit that conveyed a sanitized version of the record including the accidental nature of the shooting, the court cannot conclude that Eisen has met his burden of establishing that the sentencing exhibit as filed failed to accomplish this.

Because Eisen has neither established that the plea agreement included a term that the draft he reviewed would be the sentencing exhibit as filed, or that the sentencing exhibit as filed rendered the record unsanitized, Eisen's claim of breach of the plea agreement does not warrant federal habeas corpus relief.

2. Co-defendant Smith's Sentencing Exhibit

Petitioner next asserts that the Commonwealth breached the plea agreement when, eight months after Eisen and his co-defendant were sentenced, Conrad filed a substantially different sentencing exhibit in the co-defendant's case. With respect to this issue, the record reveals the following undisputed facts. Eisen's co-defendant was James Smith. Smith entered his guilty plea and was sentenced on May 4, 1994, over two weeks prior to Eisen's plea, which was entered on May 23, 1994. On February 13, 1995, almost nine months after Smith was sentenced, the Commonwealth filed a sentencing exhibit in his case which, in several instances, varied markedly from the language in Eisen's sentencing exhibit. Specifically, in Smith's sentencing exhibit, the Commonwealth inserted the phrase "by Eisen" in two relevant places. First, it inserted the phrase in the discussion concerning the specifics of the "rip-off plan; second, it inserted the phrase in the language concerning how the victim was contacted. Next, the Commonwealth added the phrase "[t]o avoid discovery," in Smith's sentencing exhibit before the sentence in Eisen's sentencing exhibit, "The deceased was loaded into Mr. Eisen's trunk." The change in Smith's sentencing exhibit, however, that is most damaging to Eisen, was the addition of the following language.

> According to Smith, as the officer approached he was asked by Eisen to shoot [t]he officer. Smith refused. Both individuals were taken into custody.

The final change in Smith's sentencing exhibit was the insertion of the phrase "[t]hroughout court proceedings in this matter" before the sentence: "[b]oth defendants remain insistent that it was not their intent to kill Daniel

Bostedo and that he was to be left alive and unharmed after the robbery." Notwithstanding these facts, petitioner has failed to establish that he is entitled to federal habeas corpus relief because he has failed to establish that there was any term of his plea agreement regarding co-defendant Smith's sentencing exhibit.

The plea agreement between Eisen and the Commonwealth was not reduced to writing. In any event, it is the responsibility of counsel to "state on the record in open court, in the presence of the defendant, the terms of the agreement." Pa. Rule Crim. Proc. 319(b)(2) (as enacted at the time of Eisen's plea). Here, Conrad stated the terms of the plea agreement as follows.

> My understanding of the plea arrangement is the following: Mr. Eisen, at the information charged, criminal homicide, for the record is 9302685, will plead guilty to a count of second degree murder for which there is a mandatory term of life imprisonment.
>
> At the second information, 9304232, Mr. Eisen will plead guilty to the first count of robbery and the second count of criminal conspiracy, which generally alleges his involvement with James Smith in the robbery of the deceased, in the criminal homicide of Daniel Bostedo.
>
> Obviously these charges are related. Commonwealth will, because of the second degree murder plea, dismiss Count three, which is the criminal conspiracy to commit the criminal homicide of Daniel Bostedo, and agree, because of the nature – one of the charges merges for the purposes of sentencing, anyway. We would ask the Court as part of the agreement there is no further

sentence on the robbery and Count two, the criminal conspiracy, which Mr. Eisen will plead.

The only consideration for this would be that on completion of this particular sentencing proceeding today, plea and sentence action, the Commonwealth will tender to the Court a sentencing exhibit which will document the facts of this particular sentencing proceeding, the facts of – there is already a letter tendered from Mr. Eisen to the family of Mr. Bostedo, recognition of the fact that he has saved the family – Mr. Bostedo's and also as well as his own – the agony of a trial. And this is a very big step on his, and in our opinion, his feelings of remorse and rehabilitation.

The purpose of this sentencing exhibit will be for whatever gubernatorial proceeding might take place in the future due to the nature of the mandatory life sentence.

THE COURT: Can I see the exhibit?

MR. CONRAD: It really would not be appropriate to tender it until Mr. Eisen has completed his colloquy and we are convinced of [sic] it would include legitimacy of his expression to the victim's family and this proceeding itself.

THE COURT: I'm unclear on what that means. Obviously it wouldn't go to the elements of the offense.

MR. CONRAD: No. All it is –

THE COURT: For what reason are we going to use it?

MR. CONRAD: It is to [sic] entered in the file so that – obviously on the life sentence it is mandatory without parole. The only manner in which he can be eligible for parole is gubernatorial clemency and commutation of the life sentence. As often happens over the length of time, it is recognized that when people try to get in touch with the prosecutor the case or family of the victim and those things at a later time, it has not been recorded, you know the nature of the cooperation has not been properly recorded. That's all this sentencing exhibit is intended to do.

THE COURT: I take it the family of Mr. Bostedo has no objection to this being made part of the record.

MR. CONRAD: No. Their expressions are there. They are not – their feelings on what should occur at the time of commutation are still entirely theirs. All this does is document what has taken place today, the fact a letter has been tendered to the family of Mr. Bostedo and whether or not there are any oral expressions before the sentencing in this case, whether he has a right of allocution.

THE COURT: All right that made it somewhat clearer.

Guilty Plea and Sentencing Transcript, May 23, 1994 at pp. 3-6 (Herein after [sic] "S.T. at ___").

Conspicuously absent from the discussion set forth above is any agreement regarding Smith or Smith's sentencing exhibit. If in fact such were a term of the agreement as understood by Mr. Manifesto or by Eisen, it was incumbent upon Eisen or Manifesto to so inform the

court.[21] Indeed they were immediately afforded a chance to do so. As soon as Conrad had explained the terms of the agreement on the record in open court, Judge O'Toole addressed Eisen as follows:

> THE COURT: . . . Mr. Eisen, did you hear and understand Mr. Conrad's statements?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: Is that your understanding of this matter?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: In addition to what Mr. Conrad has said, has anybody promised you anything to get you to do this?
>
> THE DEFENDANT: No, Your Honor.

If Eisen had an understanding, reasonable or otherwise, that one of the operative terms of the plea agreement related to Smith or to Smith's sentencing or the Commonwealth's actions in relation to Smith or Smith's sentencing, it was incumbent upon Eisen to speak up then. As he did not, and because nowhere in the record is there the merest hint of evidence tending to show that anything about Smith, his plea or his sentence, was even considered by the parties, far less made part of their agreement, the

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[21] Likewise, Eisen's family was present in the courtroom and it is represented that it was their understanding that the plea agreement contained a term regarding Smith or the proceedings in the Smith case. If it were their understanding at the time, there is no explanation why they did not, at that time, question Eisen or Manifesto about this omission from the terms of the plea agreement.

petitioner has failed to show that Smith's sentencing exhibit breached Eisen's plea agreement, which it is his burden to do.

It is sufficient, in short, for the court simply to hold that the record lacks any affirmative support for the proposition that one of the terms of the plea agreement was that either Conrad or, more generally, the Commonwealth, would or would not do or refrain from doing anything in the case of Smith. This is so because it is Eisen's burden to establish the terms of the plea agreement. Because it is Eisen's burden and the record lacks affirmative evidence of such terms, this claim of breach must fail. However, the court notes that not only is there an absence of evidence of record establishing that any term of the plea agreement related to the conduct of the Smith case, but there is also affirmative evidence of record to support the conclusion that it was not a term of the plea agreement.

Mr. Manifesto testified plainly that the Commonwealth's treatment of Smith never even entered into his mind in the course of negotiating the terms of Eisen's plea agreement. PCRA Testimony 7/18/96-7/19/96 at pp. 57-58 ("Our [Manifesto's and Conrad's] negotiations did not include Mr. Smith, so I did not in the course of our negotiations say to Mr. Conrad what are you going to do for Mr. Smith, or what if anything."). In fact, in questioning Manifesto about Conrad's inclusion into the Smith sentencing exhibit the challenged statement that Eisen asked Smith to kill the police officer, the following exchange took place between Manifesto and counsel for Eisen in the PCRA proceedings:

> Q. .... Would you have interpreted that [i.e., Conrad's including the challenged statement

> in Smith's sentencing exhibit that Eisen requested Smith to kill the officer] as a breach of the plea agreement?
>
> A. I don't want to cut hairs, but I have to say in the course of our discussion I never discussed with Mr. Conrad anything about Mr. Smith's plea or any deal or thinking along the lines that he was getting. If that had been part of our negotiations then I would say yes. It was not, and I can only say then that quite frankly I don't know that I would want to venture that opinion. I will say that our negotiations did not include anything as it related to Mr. Smith's plea, sentence, or anything that the district attorney's office was going to do subsequent thereto.

PCRA H.T.1 at pp. 58-59. Thus, the record simply does not support a claim that the Commonwealth breached a term of the plea agreement; the record does not support the existence of any term of the plea agreement relating to Smith and, in fact, it supports the contrary conclusion that there was no such term.

Really, the heart of petitioner's argument here is founded on his claim that the whole purpose of his plea agreement was that his "record," when it was presented to the Board of Pardons, would be "sanitized." Granting this premise, it does not follow that the inclusion of the challenged language[22] in Smith's sentencing exhibit contravened the purpose of Eisen's plea.

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[22] The portion of the Smith's sentencing exhibit that Eisen complains of is as follows: "According to Smith, as the officer approached he

(Continued on following page)

Eisen's argument is premised on his belief that the members of the Board, in considering a future application for clemency, definitely would review the statement in Smith's sentencing exhibit and it would adversely affect Eisen's prospect for commutation. Eisen's factual contention is based on his allegation that the members of the Board of Pardons review the "files" of all co-defendants. HP at p. 15 ("the Board reviews the files of all co-defendants when making a recommendation regarding commutation"); Traverse at p. 6 ("Review of the Board of Pardons' documents demonstrates that the Board reviews co-defendant's files for information and parity consideration when determining commutation. (Vol. 1 Exhibit 18).").

There is no stipulation in the record that the members of the Board of Pardons review state court records.[23] Moreover, the court has reviewed the Board of Pardons' files upon which Eisen relies for the proposition that the members of the Board review the actual state court records of co-defendants. This review revealed that, although the Board in its written recommendations does make reference to sentences received and served by a commutation applicant's co-defendants, it is not at all

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was asked by Eisen to shoot the officer. Smith refused." HP Appendix at 23. This is the only specific complaint that Eisen makes regarding Smith's sentencing exhibit. See Footnote 11 supra.

[23] The only stipulations in a related vein are stipulations that the Board of Pardons' recommendations are in fact authentic and that the statistical reports from the Board are admissible as evidence in the PCRA proceedings in addition to a stipulation concerning the testimony of witnesses Douglas Hoffman and Lisa Matteson. See Commonwealth Exhibit No. 18. The stipulated testimony of Hoffman and Matteson does not address whether the Board of Pardons reviews the state court records of either applicants or their co-defendants.

apparent from these records that the members of the Board actually see the state court records of the co-defendants. In fact, it appears from these Board of Pardons records that the members of the Board do **not** see the state court records of a commutation applicant's co-defendant(s). Instead, it appears that the members of the Board of Pardons rely upon reports prepared by the Board of Probation and Parole. See, *e.g.*, Board of Pardons' Recommendation in the case of John Rush wherein the Board states that "[t]he Board of Probation and Parole report reveals that applicant's accomplice, Harold Daniels, who was convicted of First Degree Murder, had his Life sentence reversed by the Pennsylvania Supreme Court and ruled for a new trial. Currently he is on bail and is in the community. (Parole Report dated September 20, 1978)", contained in Commonwealth Exhibit 18. Several of the Board of Pardons's Recommendations refer to a "careful review of all authoritative reports." *See id.*; Board of Pardons' Recommendations in the cases of William E. Peters; George L. Hamilton. Indeed, the court also reviewed the Board of Pardons' Recommendations contained in Commonwealth Exhibit 21. Those Recommendations likewise support a conclusion that the members of the Board of Pardons do not see the state court records of a commutation applicant's co-defendants but instead rely upon reports prepared by the Board of Probation and Parole. *See, e.g.*, Board of Pardons' Recommendations in the cases of Gene Edward Attig ("The District Attorney, Harold E. Sheeley, when interviewed by Parole Investigator, C. A. Bower. . . . "). Almost all of the Recommendations contained in Commonwealth Exhibit 21 contain the statement "after careful review of all authoritative reports." Indeed it does not even appear that the members of

the Board have the state court records of the commutation applicant himself before them.

That the members of the Board of Pardons do not see the state court records but instead rely upon reports prepared by the Board of Probation and Parole is supported by 37 Pa. Code § 81.226, which provides, in relevant part, as follows.

> (a) A copy of each application [for commutation) will be sent by the Board to the court, to the district attorney of the county from which the applicant was sentenced and to the correctional institution in which the applicant is confined to obtain expression of opinions as to the merits of the application, and to the Board of Probation and Parole for its investigation.
>
> (b) When the reports and opinions have been received, the members of the Board will review the case and a merit review vote will be conducted at a public hearing . . . .

37 Pa. Code § 81.226. This administrative regulation supports the conclusion that the Board of Pardons does not receive the state court records of the commutation applicant himself, much less the state court records of the commutation applicant's co-defendants. If anything, this regulation supports the conclusion that the Board of Pardons relies upon reports and opinions, including the investigative report of the Board of Probation and Parole.

Eisen's claim is that the Commonwealth breached its plea agreement with him by polluting his sanitized record, which he assumes is reviewed by the Board of Pardons, when it included in Smith's sentencing exhibit the complained-of language. This claim, in turn, rests upon the

factual contention that the members of the Board of Pardons will necessarily see this objectionable language and it would unfavorably influence them. Thus, it is incumbent upon Eisen to support this factual contention by evidence in the record. And the evidence Eisen points to is the Board of Pardons' Recommendations. As discussed above, however, this evidence does not support the factual contention that the members of the Board of Pardons ever see the state court records of co-defendants of commutation applicants, or the commutation applicant himself. There is no evidence in the record tending to show what is contained in the reports that the members of the Board of Pardons actually do see. Nor is there evidence showing what is reviewed by those who prepare the reports that the members of the Board of Pardons review. Without such evidence, a claim that the objectionable language in Smith's sentencing exhibit would appear in the Board of Probation and Parole's report to the members of the Board of Pardons, or in any other report that the members of the Board of Pardons would see, is speculation alone. Because there is no such evidence and it was Eisen's burden to produce such evidence in support of his contentions, Eisen simply has failed to meet his burden of proving that the Commonwealth's inclusion of the challenged statement in Smith's sentencing exhibit breached any term of the plea agreement.[24]

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[24] Eisen does assert that there is a practice of the Board of Pardons to subpoena court records. Traverse at p. 13 ("Counsel [i.e., Manifesto] was unaware of the Board's procedure regarding subpoenaing court records (R.226-227) . . .)". The Court reviewed the citation to the reproduced record at pp. 226-27. The only reference to subpoena appears in a question by Eisen's PCRA counsel to Manifesto:

(Continued on following page)

A judgment of conviction in a state court carries with it a presumption of regularity in federal court. *Meyers v. Gillis*, 93 F.3d 1147, 1151 (3d Cir. 1996) ("Meyers I") ("On collateral attack . . . , the state receives the presumption of regularity and all reasonable inferences.") (quoting *Higgason v. Clark*, 984 F.2d 203, 208 (7th Cir. 1993), *cert. denied*, 508 U.S. 977 (1993)). Given this presumption of regularity, it is Eisen's burden to establish, at the very least by a preponderance of the evidence,[25] that his constitutional rights were violated. *See United States ex rel v. Johnson*, 531 F.2d 169, 174 (3d Cir.), *cert. denied*, 425 U.S.

Q. AND AGAIN DID ANYONE TELL YOU OR DID YOU SEE ANY STUDY OR STATISTICS OR ANYTHING WHICH LEAD YOU TO BELIEVE THAT THE BOARD OF PARDONS WOULD LOOK TO OR SUBPOENA THE CLERK OF COURTS FILE IN THE ORIGINAL [i.e., Eisen's criminal] CASE?

A. NO. I WOULD THINK THAT THAT'S THE FUNCTION AND DUTY OF THE PARTY SEEKING COMMUTATION, THROUGH HIS COUNSEL OR HIMSELF.

The court notes that the only reference to "subpoena" is in the question of Eisen's PCRA counsel. It is hornbook law that "questions of counsel are not evidence." *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001). Thus, in fact there is no **evidence** of record to support the contention that the Board of Pardons as part of its procedures subpoenas state court records of commutation applicants or of their co-defendants. The court does note that the Board of Pardons does have the power to subpoena witnesses to appear before it. 37 Pa. Code § 81.293 ("The Board may request or subpoena a person to appear at the public hearing as a witness.").

[25] To the extent that Eisen is challenging the factual determinations of the Superior Court, he has a burden to rebut the presumption of correctness of those factual findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

997 (1976).[26] The evidence of record relied on by Eisen in the form of the recommendations from the Board of Pardons simply is insufficient to rebut the presumption of regularity of his state court conviction.

To the extent that Eisen argues he is entitled to an evidentiary hearing on this claim given the state of the record, he is incorrect. 28 U.S.C. § 2254(e)(2) provides that if the applicant has failed to develop the factual basis of a claim in State court proceedings, the federal habeas court shall not conduct an evidentiary hearing on the claim unless the applicant makes a showing that "the factual predicate could not have been previously discovered through the exercise of due diligence. . . . " Here, Eisen has not shown that the factual predicate could not have been previously discovered through the exercise of diligence. In fact, Eisen did attempt to establish in the state courts the factual predicate (*i.e.*, members of the Board of Pardons see state court records of a commutation applicant's co-defendants) via the evidence of the recommendations from the Board of Pardons; but that evidence is insufficient to establish the factual predicate. Having failed to produce in the state courts the evidence necessary to establish the factual predicate of his claim, he is not now entitled to a second chance to do so at a federal evidentiary hearing.

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[26] *See also Garlotte v. Fordice*, 515 U.S. 39, 46 (1995) (noting that the habeas petitioner generally bears the burden of proof); *Jones v. Vacco*, 126 F.3d 408, 415 (2d Cir. 1997) ("On a petition for a writ of federal habeas corpus, the petitioner bears the burden of proving by a preponderance of the evidence that his constitutional rights have been violated.").

E. The Constitutionality of Eisen's Guilty Plea

Eisen next argues that his guilty plea was not knowingly or intelligently entered because he did not understand the consequences of his plea, *i.e.*, he believed that he would be eligible for and would obtain commutation of his sentence in 10-12 years. It is Eisen's burden to establish this. *Hill v. Beyer*, 62 F.3d 474, 481 (3d Cir. 1995).

The PCRA court concluded that Eisen had established that his plea was unlawfully induced. HP Appendix at 6 (PCRA Court slip op. at 6). It appears that the PCRA court made this determination because it concluded that Eisen did not have an adequate understanding of what he was receiving in the plea agreement and based on Eisen's belief "that he would be eligible and in fact would receive commutation after a period of approximately ten to twelve years." HP Appendix at 5 (PCRA Court slip op. at 5). The Commonwealth observes that the Superior Court found that Eisen's guilty plea was knowing and voluntary. Answer at p. 124, citing the Superior Court slip opinion at p. 9. And indeed, the Superior Court opinion does state that "we find it clear appellee [i.e., Eisen] knowingly, voluntarily and intelligently entered his guilty plea." HP Appendix at p. 17. The Commonwealth contends that this is a finding of fact to which the presumption of correctness attaches. Eisen, on the other hand, argues that this "finding" by the Superior court is really a legal conclusion that this court can review *de novo*.

Eisen is correct, but only this far: a determination whether a plea is voluntary, knowing and intelligent is a question of law, or at most a mixed question of law and fact. *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983) ("We entirely agree with the Court of Appeals for the Sixth

Circuit that the governing standard as to whether a plea of guilty is voluntary for purposes of the federal Constitution is a question of federal law, and not a question of fact . . . "). Petitioner is not right, though, when he says that a federal court entertaining a habeas petition may review, *de novo,* the legal conclusion of a state court that a plea was knowing, intelligent and voluntary. Rather, the applicable rule is that the federal habeas corpus court's review is limited to deciding whether the state court's determination was contrary to Supreme Court precedent or an unreasonable application of federal law. *See Williams v. Taylor; Bird v. Everett,* 215 F.3d 1336 (Table), 2000 WL 717089 (10th Cir. 2000) (applying the "contrary to" and "unreasonable application" standard to state court's determination of whether a state defendant's plea was voluntary, knowing and intelligent). Eisen does not analyze the AEDPA standard of review applicable to this question, notwithstanding that the Commonwealth specifically raised this issue in its answer. HA at p. 117.

The claim that Eisen's plea was not voluntary, knowing and intelligent was a "claim that was adjudicated on the merits in [the] State court proceeding" within the meaning of Section 2254(d). *See also* Traverse at p. 3 (asserting that the Superior Court addressed each of Eisen's arguments on the merits including "that the plea was not knowingly or intelligently entered because Petitioner did not know the consequences of his plea. . . . "). Accordingly, the standard of review is set forth in 28 U.S.C. §§ 2254(d) and (e), and is as follows.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on

the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In applying the "contrary to" standard of review, the Court of Appeals for the Third Circuit has noted that "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." *Werts v. Vaughn*, 228 F.3d at 197 (quoting *Matteo v. Superintendent, SCI-Albion*, 171 F.3d 877, 888 (3d Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 824 (1999)). The Court in *Werts*, further explained that:

> [i]n analyzing the "unreasonable application of" provision, we are not authorized to grant habeas corpus relief simply because we disagree with the state court's decision or because we would have reached a different result if left to our own devices.

> A contrary holding would amount to de novo review which we have held is proscribed by the AEDPA. Thus, the appropriate inquiry at this juncture is whether the state court's application of Supreme Court precedent was objectively unreasonable. *Williams,* 120 S.Ct. at 1521; *Matteo,* 171 F.3d at 889-90. In other words, "[t]he federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Matteo,* 171 F.3d at 890.

Werts v. Vaughn, 228 F.3d at 197 (some citations omitted).

It is petitioner's burden to prove the state court decision is either contrary to or an unreasonable application of clearly established federal law. *See Matteo,* 171 F.3d at 888; *Jacobs v. Horn*, 129 F.Supp.2d 390, 395 (M.D.Pa. 2001). Under the "contrary to" clause, the relevant universe of analysis is restricted to the holdings of United States Supreme Court cases as they existed at the time of the state court decision. *Williams*, 529 U.S. at 412. In contrast, under the "unreasonable application" clause, federal habeas courts may consider lower federal court cases in determining whether that state court's application of Supreme Court precedent was objectively unreasonable. *Matteo,* 171 F.3d at 890.

In making his argument that his plea was not voluntary, the only Supreme Court cases to which Eisen cites are *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969) and *Santobello v. New York*, 404 U.S. 257 (1971). (See Docket #1 at p. 17; Traverse at pp. 10-12). However, nowhere does Eisen argue that the Superior Court's adjudication of this claim represents a

decision contrary to that reached by the Supreme Court on the same question of law or that the Superior Court decided the case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams,* 529 U.S. at 412-13. The Supreme Court explained the "contrary to" standard as applying to cases "where the state court applies a **rule** that contradicts the governing law set forth in our cases." *Id.* at 405. Here the Superior Court simply did not apply a rule of law that contradicts the governing law set forth in Supreme Court cases. And Eisen does not say that it did. In fact, the Superior Court utilized the correct federal constitutional rule, *i.e.*, a plea will not be invalidated if its tender was knowing, voluntary and intelligent.

The Supreme Court also explained in *Williams* that a state court adjudication could also be "contrary to" the Supreme Court's precedent if the state court confronts a set of facts that are materially indistinguishable from a case in the Supreme Court and nevertheless arrives at a result different from the Supreme Court's decision. *Id.* at 406. This court concludes that the facts of Eisen's case are not "materially indistinguishable" from the facts of *Brady*, *Boykin* or *Santobello* so as to render the Superior Court's conclusion that Eisen's plea was knowing, voluntary and intelligent contrary to those cases.[27]

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[27] In *Boykin*, there was no evidence of any colloquy whatsoever. *Boykin*, 395 U.S. at 239 ("So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court."). In addition, the court noted in *Boykin* that "[t]rial strategy may of course make a plea of guilty, seem the desirable course. But the record is wholly silent on that point and throws no light on it."

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Accordingly, the court now turns to the analysis of whether the Superior Court's decision in this case was an unreasonable application of clearly established federal law. The relevant inquiry is whether the Superior Court's decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under Supreme Court precedent existing at the time of the Superior Court's decision. In making this inquiry, this court may consider federal cases decided by courts other than the Supreme Court in performing this analysis. *Matteo*, 171 F.3d at 890. However, it is not sufficient for a habeas petitioner to show that the state court applied federal law incorrectly or erroneously, rather the state court's application of federal legal standards also must be objectively unreasonable. *Williams*, 529 U.S. at 411.

Id. at 240. These facts render *Boykin* materially distinguishable from the instant case.

In *Brady*, the court upheld the voluntariness of the guilty plea, as the Superior Court did here. Thus, the Superior Court's decision here did not reach a result contrary to the decision the Supreme Court reached in *Brady*. Accordingly, the Superior Court's decision in this case is not "contrary to" *Brady* within the meaning of *Williams* and AEDPA.

In *Santobello*, the prosecution promised the defendant-petitioner that it would make no sentence recommendation to the court in exchange for a plea of guilty. However, at the sentencing proceedings, the prosecution did make a recommendation and the defendant petitioner sought to withdraw his guilty plea. The Supreme Court found that the prosecution's promise induced the plea and because the prosecution broke its promise, the guilty plea had to be vacated. In contrast, here, this court has found that, unlike in *Santobello*, Eisen failed to establish that the prosecution breached any promise made to him. Because there was no broken promise by the prosecution, Eisen has failed to establish that this case is, on the facts, materially indistinguishable from the facts of *Santobello*.

Whether a plea of guilty is voluntary for purposes of the federal constitution is a question of federal law. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). To determine whether a guilty plea represents a voluntary and intelligent choice, a reviewing court must examine the totality of the circumstances surrounding the plea. *Brady*, 397 U.S. at 749. To ensure that a plea is both knowing and voluntary, it cannot have been induced by misrepresentation or coercion, *id.* at 750, the defendant must have notice of the nature of the charge(s) against him, *Henderson v. Morgan*, 426 U.S. 637, 645 (1976), the defendant must have an understanding of the law in relation to the specific facts at issue, *McCarthy v. United States*, 394 U.S. 459, 466 (1969), and the defendant must appreciate the consequences of the plea, *i.e.*, he must understand the rights he is surrendering through his plea.[28] In reviewing whether a guilty plea is "voluntary" for purposes of the United States Constitution, the federal courts apply federal law. *Zilich v. Reid*, 36 F.3d 317, 320 (3d Cir. 1994). *Id.* Notwithstanding, the state court's determination of the historical facts surrounding the plea is subject to the deferential "presumption of correctness" of [former] 28 U.S.C. § 2254(d) [now codified at 28 U.S.C. § 2254(e)(1)]. *See id.* at 320 (citing *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983)).

Once entered, a plea of guilty entered by one fully aware of the direct consequences must stand unless induced by threats, misrepresentation, or improper promises. *Mabry*

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[28] A defendant who enters a guilty plea waives his constitutional privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969).

v. Johnson, 467 U.S. 504, 509 (1984) . It is only when a defendant is not fairly apprized of the direct consequences of pleading guilty that he may challenge his guilty plea under the Due Process Clause. *Id.* However, the failure to advise a defendant about the possible adverse *collateral* consequences of a guilty plea does not offend due process concerns. *Parry v. Rosemeyer*, 64 F.3d 110 (3d Cir. 1995), *cert. denied*, 516 U.S. 1058 (1996). The Court of Appeals for the Third Circuit has explained that a "direct" consequence is one that has a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *Id.* at 113. "The only consequences considered direct are the maximum prison term and fine for the offense charged." *Id.* at 114 (*citing United States v. Salmon*, 944 F.2d 1106, 1130 (3d Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992)).

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. . . . We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Brady, 397 U.S. at 757. The Supreme Court reiterated the same principle in *Blackledge v. Allison*, 431 U.S. 63, 73 (1977), wherein it cautioned that federal habeas relief should be especially rare when the petitioner stated, upon entering the guilty plea, that he or she did so knowingly and voluntarily.

Eisen argues that his guilty plea was constitutionally infirm because he did not truly understand the consequences of his plea, *i.e*, that he could serve life without parole and that his sentence may never be commuted, because, he says, he believed that his sentence would be commuted in 10-12 years. As a factual matter, Eisen alleges that Manifesto told him that he definitely would get out of prison in 10-12 years. *See* PCRA H.T.1 at pp. 209-211. Hence, Eisen makes this challenge to the Superior Court's determination that the plea was knowing, voluntary and intelligent. In his habeas petition and Traverse, in addition to the Supreme Court cases cited above, Eisen heavily relies upon *Meyers II*. In addition, Eisen cites to *Pitts v. United States*, 763 F.2d 197 (6th Cir. 1985) and *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1998).

In *Meyers II*, the defendant, a Pennsylvania prisoner, pleaded guilty to second degree murder and was sentenced to life in prison. Subsequently, he filed a habeas petition in which he alleged that he had been deprived of the effective assistance of counsel because his public defenders told him that he would be eligible for parole in seven years. The truth of the matter is, however, that a prisoner in Pennsylvania convicted of second degree murder was not eligible for parole consideration unless the Governor commuted his life sentence to a term of imprisonment for a period of years. The defendant testified that "he did not recall his attorneys ever using the term 'commutation'

during their discussions." *Meyers II*, 142 F.3d at 666. Defense counsel testified that they had based the information they communicated to the defendant upon the commutation record of Governor Shapp. However, at the time of his sentencing, Shapp had been replaced by Governor Thornburgh who had a history of not commuting life sentences. Even so, in open court, during the sentencing hearing, the defendant was informed in the presence of the court and the prosecutor that he would be eligible for parole sometime in the future. Neither the court nor the prosecutor made any effort to clarify the record and inform the defendant of his ineligibility for parole. On this record, because the defendant was given incorrect advice by his defense counsel regarding parole eligibility, the Court of Appeals held that he had been denied the effective assistance of counsel and affirmed the grant of habeas relief.

To the extent that the Superior Court decision may be read as accepting Eisen's factual assertion that Manifesto affirmatively misled him into believing that his sentence definitely would be commuted in 10-12 years, an interpretation of that decision that this court specifically does not make, it is true that *Meyers II* appears, on its face, to lend some support to Eisen's position that the Superior Court erred. However, the Third Circuit stated plainly in *Werts* that "[i]n analyzing the 'unreasonable application of' provision, we are not authorized to grant habeas corpus relief simply because we disagree with the state court's decision or because we would have reached a different result if left to our own devices." Thus, the pertinent inquiry is not whether the Superior Court complied with Third Circuit precedent but whether the Superior Court's determination that Eisen's plea was knowing and intelligent was unreasonable.

So *Meyers II*, insofar as it can be seen as supportive of the petitioner, does not end the inquiry. And the Third Circuit has recognized this when it instructed the district courts that they may answer the "unreasonable application" question by recourse to the opinions of lower federal courts. *Matteo*, 171 F.2d at 890. So this court may properly consider what other courts have decided regarding this issue or what they have done in similar situations. Research has uncovered other cases decided by other courts that have held that a defense counsel's mistaken advice regarding parole or commutation eligibility did not render a defendant's plea unknowing. *See, e.g., James v. Cain*, 56 F.3d 662, 666-667 (5th Cir. 1995) (holding that a defendant's misunderstanding of the parole procedures caused by his defense counsel did not render his plea involuntary but remanding for a determination whether such incorrect advice constituted ineffective assistance of counsel in violation of his constitutional right to counsel); *Rupert v. Johnson*, 79 F.Supp.2d 680, 706 (W.D.Tex. 1999) (rejecting habeas petitioner's claim that he had a misunderstanding of his parole eligibility which rendered his plea unknowing where he alleges that his counsel misled him regarding the benefits of parole over probation and that defendant would serve only sixty days in prison, noting that "a defendant's mere expectation about the commutation and parole process is simply no ground for habeas relief."); *Trevino v. Arizona*, 527 F.2d 439 (9th Cir. 1979) (court rejected claim that defense counsel's erroneous advice to defendant that if he pleaded guilty he would be eligible for parole within seven years rendered defendant's plea unknowing or involuntary). The reader might think all of these cases to be wrongly decided; he or she might think *Meyers II* or Eisen's own case in the Superior Court to

have been wrongly decided, but that misses the point. Wrong or right as they may be, are any of these decisions unreasonable application of federal law? This is the question. This court cannot say that the cases cited above constitute unreasonable applications of federal law. Considering the reasoning of these cases and how they applied Supreme Court precedent, these cases may properly be considered to weigh in favor of a finding the that the Superior Court's determination was not unreasonable in this case. In light of the reasoning of these cases, this court cannot conclude that Eisen has met his burden of showing that the Superior Court's determination in his case constituted an objectively unreasonable application of federal law. And this is so even if he were to have established that the Superior Court's determination was an incorrect application of federal law.

More importantly, however, all of the foregoing discussion depends upon a finding that the Superior Court accepted as fact that Manifesto affirmatively misled Eisen by informing him that his sentence definitely would be commuted in 10-12 years. But nowhere in the Superior Court opinion is there such a factual determination. Neither is there any such factual determination made by the PCRA court. The only facts found by the PCRA court in this regard are as follows:

> there was a great amount of testimony dealing with the import of what it was Mr. Eisen was receiving pursuant to this sentencing exhibit. The appellee testified that it was his understanding that he would be eligible and in fact would receive commutation after a period of approximately ten to twelve years. Trial counsel indicated that there was never any particular promise in terms of a number of years made to

> his client but did detail efforts to try to get the Commonwealth to agree to a plea of third degree murder. The other witnesses called by both Mr. Eisen and by the Commonwealth essentially testified about and concerning the same matter. It is abundantly clear that subsequent to this plea there was a great degree of confusion as to precisely what it was Mr. Eisen was to receive. It is plain to this court that under the unique facts in this plea agreement it was error on the part of the court not to get appellee, Mr. Eisen's understanding of what he was receiving. The language used by the District Attorney was broad and suggested in a general way what was sought to be accomplished by the plea agreement. However, in light of the subsequent testimony this court heard and the observations made of the various witnesses on behalf of both appellee and the Commonwealth, it is this court's conclusion that the court erred when it did not comply strictly with Rule 319b and do a thorough and complete colloquy as to Mr. Eisen's on the record understanding of precisely what it was he was to receive. The purpose of Rule 319b is to insure that all terms of the *quid pro quo* are openly acknowledged on the record.

HP Appendix at pp. 5-6 (PCRA Court slip op. at 5-6). The PCRA court never determined as a fact that Manifesto informed Eisen that he definitely would be released in 10-12 years.[29] The exact holding of the PCRA court was this:

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[29] To the extent that Eisen suggests otherwise, he has failed to carry his burden to convince this court that the PCRA court found as a fact that Manifesto told Eisen his sentence would definitely be commuted in 10-12 years. *See, e.g.,* Traverse at p. 14, wherein Eisen argues

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"*subsequent* to this plea there was . . . confusion . . . " and that the court had violated a Pennsylvania rule of procedure by not eliciting from Eisen at the time of the plea precisely what his understanding was. The PCRA court did *not* hold either that Manifesto misled his client or that Eisen *was* confused when he pleaded. The state courts simply did not find as a fact that Manifesto informed Eisen that he definitely would have his sentence commuted in 10-12 years.

Without such a factual finding, the rule in *Meyers II* is inapplicable here; the factual predicate in *Meyers II* is that defense counsel gave erroneous information to the defendant. Here, there is no such state court finding. And the PCRA court having failed to make this factual finding, the Superior Court affirmatively appears to have rejected Eisen's contention that Manifesto erroneously told him he definitely would get out of prison in 10-12 years. The Superior Court stated that "[t]he benefit achieved by the plea and the incorporation of the affidavit to achieve favorable consideration (**not a promise**) for commutation in the future, and the risk of trial and possibility, if not

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that "[w]e submit, by this passage, the PCRA court found counsel ineffective sub silencio [sic] and found credible petitioner's testimony that counsel advised that the [sentencing] exhibit provided a concrete benefit for release within a term of years."). The "passage" from the PCRA court's opinion upon which Eisen relied is as follows: "the record contains an analysis of gubernatorial commutations and it would appear unlikely this [D]efendant would receive any relief for at least several decades. While it is clear that the sentencing exhibit certainly postures him in a better position for any future clemency than if it did not exist ***the tenuous benefit of the sentencing exhibit is not all clear.***" Traverse at p. 14, assertedly quoting from PCRA court op. at pp. 6-7 (emphasis added by petitioner).

likelihood, of a first degree murder verdict with any prospect of commutation being seriously diminished, was the heart of the bargain accepted and achieved by appellee." HP Appendix at p. 13 (Superior Court slip op. at p. 5) (emphasis added). This appears to constitute a fairly explicit finding of fact by the Superior Court. Even if it constitutes merely an implicit finding of fact, such implicit findings of fact are tantamount to express ones. *Parke v. Raley,* 506 U.S. 20, 35 (1992); *Marshall v. Lonberger,* 459 U.S. 422, 432-33 (1983); *LaVallee v. Delle Rose,* 410 U.S. 690, 692 (1973) (per curiam). In either case, the finding of fact by the Superior Court is presumed to be correct and is conclusive upon this court unless it is an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. 2254(d)(2) and (e)(1). *Dickerson v. Vaughn* 90 F.3d 87, (3d Cir. 1996); *Lawson v. Vaughn,* Civ. A. No. 00-2746, 2001 WL 283169 (E.D.Pa. March 22, 2001). *See also Campbell v. Vaughn*, 209 F.3d 280, 285-86 (3d Cir. 2000).

Eisen argues that the Superior Court's decision was based upon factual findings made by that court which are not supported by the record. *See, e.g.,* Traverse at p.12.[30]

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[30] In making his argument, Eisen relies extensively upon *Buehl v. Vaughn* 166 F.3d 163, 170-171 (3d Cir. 1999), wherein the Court of Appeals held that the Pennsylvania State Supreme Court's factual finding that a defendant's counsel did not request a certain jury instruction, contrary to the factual finding made by the PCRA court, was not "fairly supported by the record." However, *Buehl* was decided under the pre-AEDPA standard of former 28 U.S.C. § 2254(d) (1994) which accorded a presumption of correctness to state court factual findings unless "such factual determination is not fairly supported by the record." *See Berryman v. Morton,* 100 F.3d 1089, 1094 (3d Cir. 1996). The AEDPA inquiry is no longer whether state court factual determinations are "fairly supported by the record." Rather the inquiry under AEDPA is whether state court decision was "based on an unreasonable determination of the facts in light of the

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The court construes this as an argument under AEDPA that the Superior Court's disposition of this claim resulted in a decision that was based on an unreasonable determination

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evidence presented in the State court proceeding." This inquiry, and the standard for reviewing state court factual findings, are more deferential under AEDPA than under pre-AEDPA law. *Mills v. Cain,* No. 98-0837, 1999 WL 681384, at *4 (E.D.La. Aug. 31, 1999) ("Under the Antiterrorism and Effective Death Penalty Act, ('AEDPA'), the proper standard of review in federal collateral actions is more deferential to a state court's findings of law and fact."); *Woods v. McKune,* No. 95-3271-DES, 1998 WL 386218, at *3 (D.Kans. June 30, 1998) ("The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), changed the standards for examining state court judgments in habeas corpus actions by expanding the deference given to state court factual findings and legal determinations."). Thus, Eisen's reliance on the pre-AEDPA *Buehl* standard is unavailing.

Moreover *Buehl* is distinguishable on its facts. In *Buehl,* the PCRA court stated that Buehl's trial counsel had indeed requested a limiting instruction. The state Supreme Court apparently found to the contrary, *i.e.*, that trial counsel did not make such a request. On habeas, the Third Circuit found that the state Supreme Court's finding was not fairly supported by the record. The Third Circuit based its conclusion on the fact that there was an on the record colloquy conducted in chambers where trial counsel did request such an instruction. Thus, there was affirmative evidence of record supporting the fact that trial counsel requested an instruction. In the face of such evidence, the Third Circuit held that state Supreme Court's finding of no such request was not fairly supported by the record. In contrast, in the instant case, there is no finding by the PCRA court, explicit or implicit, that Manifesto told Eisen or anyone else that Eisen would definitely be released in 10-12 years. The Superior Court's finding that there was "no promise" of commutation is *at least* an implicit finding that Manifesto did *not* tell Eisen he would get out in 10-12 years. This finding, contrary to Eisen's contention, is not unsupported by the record. Manifesto's testimony provides support in the record for such a finding. It is true that other testimony supports a contrary finding. But Eisen's contention that there is no support in the record for a finding made at least implicitly by the Superior Court, that Manifesto did not tell Eisen he would be out in 10-12 years, is not accurate.

of the facts in light of the evidence presented in the State court proceeding within the meaning of 28 U.S.C. § 2254 (d)(1).

Eisen argues that Superior Court's finding that no promise of future commutation was given is an unreasonable determination of the facts of record. The court is not persuaded. Manifesto himself testified that he never indicated to anyone that Eisen would surely be commuted in 10-12 years. N.T.2 at p. 18. In fact, Manifesto specifically testified that he told Eisen and his family that there "were no guarantees" regarding commutation. N.T.1 at 62-63. Thus, there is evidence of record that, if credited, supports a finding that there was no promise of commutation in 10-12 years. Of course there is testimony to the contrary. N.T.1 at pp. 132-33, 171, 175-76, 199-200. It follows naturally that, if credited, the contrary testimony would support a finding contrary to that made by the Superior Court.

As noted earlier, there is no resolution of this credibility dispute by the PCRA court. Hence the Superior Court's factual finding is not contrary to any factual finding by the PCRA court, unlike the situation in *Buehl.* Even if there were conflicting factual findings by the Superior Court and the PCRA court there is some support for resolving this conflict in favor of the higher court. *See, e.g., Dickerson; Lawson.*

In *Dickerson,* the PCRA court made a factual finding that the defendants' pleas were not induced by faulty advice from their trial counsel and it denied relief. Based upon the same record, the Superior Court made a contrary factual finding and reversed, ordering that relief be granted. The State Supreme Court granted allocatur and

reversed the Superior Court's determinations but did so without expressly rejecting the Superior Court's factual finding. On habeas review, the district court denied relief. The Third Circuit reversed and remanded, relying on the factual findings of the Superior Court. In doing so, the Third Circuit held as follows:

> [f]ederal courts in habeas corpus cases are required to give deference to the factual findings of both the state trial and appellate courts. *Parke v. Raley,* 506 U.S. 20, 36 (1993); *Summer v. Mata,* 449 U.S. 539, 546 (1981) (section 2254 makes no distinction between the factual determinations of a state trial court and those of a state appellate court) . When there are conflicting fact findings by state courts, we believe that according proper deference requires us to accept the version reached by the higher court. To rule otherwise would be to insert our Court into the state appellate system and take onto ourselves the role entrusted to the state Superior Court. We find no justification for such an intrusion here.

Dickerson, 90 F.3d at 87. Likewise, in *Lawson,* where the "credibility of the witnesses in the case was . . . central to Lawson's defense," the Superior Court made factual findings that were not made by the PCRA court, although it did so while affirming the PCRA court's denial of relief. On habeas in federal court, Lawson, the habeas petitioner, argued that the Magistrate Judge, in recommending denial of relief, "improperly relied on factual findings and credibility determinations made by the state appellate court which were not made by Judge O'Keefe [the PCRA court]." Relying upon *Dickerson* and Section 2254 as revised by AEDPA, the court in *Lawson* rejected the petitioner's contentions that a federal habeas court may

not rely on a state appellate court's factual findings, including credibility determinations that were not made by the state trial court. This court finds *Lawson* persuasive authority for the proposition that where a state appellate court makes factual findings **and credibility determinations** that are not contradictory to those made by the state trial court, the deference required by AEDPA requires that the presumption of correctness attach to those findings and they are binding on this court without clear and convincing evidence to the contrary. This court further finds *Lawson* persuasive authority for the proposition that, where the state appellate court makes credibility determinations that are not made by the state trial court, and such credibility determinations are supported by the record, *i.e.*, there is testimony that if credited could support the disposition of the case made by the appellate court, such a disposition is not "an unreasonable determination of the facts in light of the evidence presented," within the meaning of 28 U.S.C. § 2254(d)(2). Thus, this court, of necessity, would resolve the question left unresolved by the Third Circuit in *Campbell,* 209 F.3d at 288 ("we express no opinion as to whether in this precise factual circumstance, the Superior Court could have made this finding of fact on the cold appellate record, such that we do not need to defer to it pursuant to AEDPA").

Now, the procedural history of this case is not typical: the PCRA court granted relief; Superior Court reversed and denied relief. The question becomes whether this atypical history alone is clear and convincing evidence that the Superior Court's apparent crediting of Manifesto's testimony and discrediting the testimony of Eisen and others is not presumptively correct. This court should hold that the different results in the Superior Court and the

PCRA court do not constitute evidence so clear and convincing that the presumption of correctness owed to the Superior Court's factual determination and subsidiary credibility determination has been rebutted by Eisen. That the decisions in the two courts are different does not, of course, mean that the two courts necessarily made contrary credibility determinations. The PCRA court's ratio decidendi was that it is "likely" or the facts "give rise to a persuasive argument" that Eisen believed that he was going to get his sentence commuted in 10-12 years and that the court erred when it failed to conduct a full colloquy as required by the Pennsylvania Rules of Criminal Procedure. Eisen's mistaken belief "likely" induced his plea; if the colloquy had been properly conducted such mistaken belief would have been revealed and rectified. Read as often and as closely as it may be, still it is true that *nowhere* in the opinion of the PCRA court is there a factual determination of the source of Eisen's confusion, if any, at the time the plea was tendered; *nowhere* does the court resolve the conflict in testimony between Manifesto and Eisen and others. Notwithstanding, by virtue of its determination that petitioner's guilty plea was intelligently and voluntarily made, the Superior Court did resolve it, implicitly at least, in favor of Manifesto's version.[31] In light of *Dickerson, Lawson,* and the deference

[31] The Supreme Court has held that the presumption of correctness applies to both implicit and explicit findings of fact by a state court. *See Parke v. Raley,* 506 U.S. 20, 35 (1992); *Marshall v. Lonberger,* 459 U.S. 422, 432-33 (1983); *LaVallee v. Delle Rose,* 410 U.S. 690, 692 (1973) *(per curiam).* In addition, the Supreme Court further has instructed that, in determining what implicit factual findings a state court made in reaching a conclusion, a federal court must infer that the state court applied federal law correctly. *Lonberger,* 459 U.S. at 433. It is the duty

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owed to state court's both appellate and trial courts as required by AEDPA, this court cannot conclude that the Superior Court's resolution of this conflict in credibility constituted an unreasonable determination of the facts in light of the evidence presented.

F. Ineffectiveness of Counsel

Eisen also asserts four grounds of ineffective assistance of counsel with respect to his guilty plea.

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Lockhart v. Fretwell,* 506 U.S. 364, 368 (1993) *(quoting Strickland v. Washington,* 466 U.S. 668, 684 (1984)).

> Thus the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to

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of the court to begin with the state court's legal conclusion and reason backward to the factual premises that, as a matter of reason and logic, must have undergirded it. *Campbell v. Vaughn,* 209 F.3d 280, 289-90 (3d Cir. 2000), cert. *denied,* (2001). Here, because the Superior Court held that Eisen's guilty plea was voluntary and intelligent, it implicitly must have credited Manifesto's testimony concerning the advice he gave to Eisen about his chances for commutation over Eisen's testimony to the contrary. *See McAleese v. Mazurkiewicz,* 1 F.3d 159, 171-72 (3d Cir.) (holding that although the trial court failed to resolve explicitly the credibility dispute between the defendant and his trial counsel, it did decide that trial counsel had thoroughly investigated and considered all the areas about which the defendant complained post-verdict. In reviewing the state court's legal conclusion, the Third Circuit held that "[i]mplicit in this conclusion is a finding that trial counsel's testimony was credible. This finding is presumptively correct and should not be disturbed by a federal court on habeas review if it is fairly supported by the record."), cert. *denied,* 510 U.S. 1028 (1993).

> receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Fretwell, 506 U.S. at 369 (quoting *United States v. Cronic,* 466 U.S. 648, 658 (1984) (internal quotes omitted). *See also Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986) (the essence of a claim alleging ineffective assistance is whether counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect).

The two-part test for determining whether counsel rendered constitutionally ineffective assistance is well known: 1) was counsel's performance unreasonable; and 2) did counsel's unreasonable performance actually prejudice the defense. *Strickland,* 466 U.S. at 687. To determine whether counsel performed below the level expected from a reasonably competent attorney, it is necessary to judge counsel's challenged conduct on the facts of the particular case, viewed at the time of the conduct in question. *Strickland,* 466 U.S. at 690. A petitioner who claims that he or she was denied effective assistance of counsel carries the burden of proof. *Cronic,* 466 U.S. at 658.

The first prong of the *Strickland* test requires a petitioner to establish that his attorney's representation fell below an objective standard of reasonableness by committing errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland,* 466 U.S. at 688. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the petitioner must overcome the presumption that, under

the totality of the circumstances, the challenged action "might be considered sound trial strategy." *Id.* at 689. The question is not whether the defense was free from errors of judgement, but whether counsel exercised the customary skill and knowledge that normally prevailed at the time and place. *Id.*

The second prong requires a petitioner to demonstrate that counsel's errors deprived him of a fair trial and the result was unfair or unreliable. *Strickland,* 466 U.S. at 689. Unfairness or unreliability does not result unless counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him. *Fretwell,* 506 U.S. at 372. To prove prejudice, a petitioner must show that there is reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694 (emphasis added). A reasonable probability is one which is sufficient to undermine confidence in the outcome. *Id.*

The two-part *Strickland* test applies to ineffective assistance of counsel claims arising out of the guilty plea process. *Hill v. Lockhart,* 474 U.S. 52, 57 (1985); *Meyers v. Gillis,* 142 F.3d 664, 666 (3d Cir. 1998). The first prong may be shown in several ways, *e.g.*, where a plea offer is never communicated to the client; where plea information is communicated so incorrectly that it undermines the client's ability to make an intelligent decision whether or not to accept a plea offer, or where a guilty plea is induced by misleading statements of defense counsel. To satisfy the second "prejudice" prong, a defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have proceeded to trial. *Hill,* 474 U.S. at 58-59. A federal

habeas petitioner seeking to withdraw a guilty plea based upon the ineffective assistance of counsel must show that counsel's advice was not within the range of competence demanded by attorneys in criminal cases; only serious derelictions on the part of counsel entitle a petitioner to relief. *Siers v. Ryan,* 773 F.2d 37 (3d Cir. 1985).

Eisen's petition contains the following ineffective assistance of counsel claims.

1. Trial counsel rendered ineffective assistance by failing to investigate and or advise Eisen of the viable defense that the killing occurred not in the commission of a robbery, which constitutes a felony murder, but the killing occurred during Eisen and Smith's attempt to commit theft by deception, which would have rendered them only guilty of third degree homicide.

2. Trial counsel rendered ineffective assistance by failing to object to Conrad's last minute alteration of Eisen's sentencing exhibit.

3. Trial counsel rendered ineffective by failing to research and investigate the latest information on commutation.

4. Trial counsel rendered ineffective assistance by advising Eisen to plead guilty in exchange for an illusory expectation of gubernatorial clemency.

Petitioner's ineffective assistance of counsel claims will be reviewed in accordance with the standards set forth above.

1. Failure to Have Investigated Defenses

As to this first claim, Eisen simply has failed to carry his burden of showing that Manifesto rendered ineffective assistance by failing to investigate or advise Eisen of the alleged defense of theft by deception and by failing independently to investigate the accuracy of the Commonwealth's theory of the case. Eisen faults Manifesto for relying on the discovery materials presented by the Commonwealth and on the police reports. Of course, as is not true in many cases, the material produced in this case might reasonably be seen as foreclosing the need for much in the way of additional investigation. When the vehicle in which petitioner and his co-defendant was stopped, it was petitioner who told police there was a body in the trunk. Only two persons witnessed the killing, petitioner and co-defendant Smith; both gave detailed statements. However, the record establishes it is not true that Manifesto failed to conduct any independent investigation. He interviewed Eisen concerning his version of the events. In addition, Manifesto interviewed Smith's attorneys. *See* PCRA HT1 at p. 67 and 74 (at p. 74 when Conrad asked Manifesto if he knew that Smith was scheduled to be a witness for the prosecution in Eisen's trial, Manifesto answered "yes I had discussed this with his lawyer to confirm that [*i.e.*, Smith was to testify on behalf of the prosecution] and to learn what his testimony, as best I could, would have been." *See also* PCRA H.T.2 at p. 35 (Manifesto testifying that he spoke to Smith's attorney prior to Smith's entering his plea and that he learned from Smith's attorney what Smith "would have testified in a trial if you [Manifesto] went to trial with Eric Eisen"). That Manifesto did not also interview Smith or others, assuming that Smith or others would have spoken to Manifesto (something that Eisen does not establish on this record as is his burden) does not

render Manifesto's assistance ineffective. Indeed the uncontradicted evidence of record is that Smith would not talk with Manifesto. *See* PCRA HT1 at p. 68 ("Our recollection was that they would not talk to us."). See also PCRA H.T.2 at p.35.

Furthermore, the record shows that Manifesto did consider the improbable "defense" of theft by deception (albeit perhaps only after others mentioned it to him) but that in the professional exercise of judgment, he determined that such a defense was not viable. This assessment was predicated upon several considerations: there was no real evidence of a scam (as, for instance, fake drugs in the form of some sort of white powdery substance), and the presence of weighty evidence pointing in the direction of premeditated murder, *e.g.* the garbage bags so that there would be no blood in Eisen's car, the discussions regarding the proposed disposal of the body. *See* PCRA H.T.1 at p. 67. *See also id.* at 70 (where Manifesto assents to the proposition that he assessed the case as being so bad that he advised Eisen to plead guilty and rely upon the possibility of commutation); *id.* at p. 84 (where in the context of explaining what negative information he was concerned about getting before the Board of Pardons if Eisen had gone to trial, Manifesto details the existence of evidence which corroborated his concern of a "very serious possibility of first degree conviction and certainly second degree.") Also Manifesto testified that although he recalled a conversation with Brian Amos, Eisen's brother-in-law, wherein Amos recounts Eisen's version of the scam and that Amos "had relayed to me a story which I could put no credibility in, I could put no credibility in this because I was hearing stories concocted by various individuals during my time of representation. I understood it was self

serving, but it was inconsistent with the evidence." PCRA H.T.1 at pp. 95-96. Moreover, Manifesto testified that he believed that if had he presented to the jury the theory of the case that Eisen was only engaging in a theft by deception, "I think I – I would have walked him [Eisen] into a first degree conviction quite frankly with that story. That's my opinion. I may be wrong but that was my opinion at the time." PCRA H.T.1. at 98. Manifesto testified that he did not believe a theft by deception theory of the case was reconcilable with the evidence in the case and that such a theory was unrealistic. PCRA H.T.1 at 97. In addition, Manifesto testified that it was his belief that the Board of Pardons would look more favorably upon a commutation applicant who had been convicted of murder of the second degree than one convicted of murder of the first degree. PCRA H.T.1 at p. 21. Eisen presents no evidence that this is not the case and thus, given the presumption of effectiveness that attends Manifesto's stewardship, Eisen has failed to meet his burden to show that Manifesto's belief, based on his own independent investigation and assessment of the evidence, and his advice based thereon, was unreasonable.

2. Failure To Object To Conrad's Last Minute Changes

The second claim of ineffectiveness challenges Manifesto's failure to have objected to Conrad's last minute changes to Eisen's sentencing exhibit. Here too, Eisen has failed to carry his burden. To prevail on this issue, Eisen must identify a legitimate ground for objection, for an attorney will not be deemed ineffective for failing to make a frivolous objection. *See Strickland,* 466 U.S. at 691 (counsel cannot be deemed ineffective for failing to raise

meritless claims)[32] Eisen's only colorable argument is that the last minute changes to the sentencing exhibit somehow breached the plea agreement. However, as has been discussed above, Eisen fails to establish that this is so. Where the late changes to the exhibit do not amount to a breach of the plea agreement, there is no other apparent basis for Manifesto to have objected and Eisen does not now offer any such alternative basis. Thus, counsel's failure to have objected cannot form the basis for any finding of ineffectiveness.

3. Failure To Investigate Commutation Statistics

Taking up Eisen's third ground of ineffectiveness, the court should find that it too lacks merit. Eisen alleges that Manifesto failed to investigate the latest statistics on commutations and that had he done so, he would have discovered that statistics for the years 1990-1995 show a life prisoner has a less than one-tenth of one percent likelihood of commutation. Of those who did have life sentences commuted during 1990-1995, the applicants had served an average of 25.06 years in prison. Eisen asserts that Manifesto's advice to accept the plea was based only upon his general legal experience and common sense and not upon any independent research, investigation or study of current statistics and public documents available from the Board of Pardons and elsewhere. HP at 33. Even if it

[32] *See also Almeida v. Jeffes,* 566 F.Supp. 852 (E.D.Pa. 1983) (holding that the petitioner was not entitled to habeas relief for ineffective assistance when his counsel failed to object to properly admitted evidence).

were true that Manifesto based his advice only on his general legal experience and common sense, it does not follow that such would constitute ineffective assistance unless it were also established that these led him to untenable conclusions, or that he misrepresented his conclusions to petitioner.

On this record, Eisen fails to establish that Manifesto's legal experience or common sense led him to misapprehend either the probability of commutation or the time Eisen would likely have to serve before being commuted. As to the likelihood of commutation, Manifesto testified that there were no guarantees that Eisen's sentence would ever be commuted and that commutations are not granted easily. HT1 at pp 62-64. The Superior Court found that this advice did not amount to ineffectiveness. The PCRA court made no finding regarding counsel's ineffectiveness on this point, notwithstanding Eisen's claim to the contrary that the PCRA court did make such a determination *sub silentio.*

As to the length of time Eisen would serve, even accepting that Manifesto told petitioner the earliest he **might** be commuted was after serving 10-12 years, such an estimate of what is, after all, an admittedly imprecise contingency, is not as inaccurate as Eisen would have it. The statistics on which Eisen relies establish that the 10-12 year period is not without support. Although from 1990 to 1995, the average time served before commutation was 25.06 years, the statistics showed that one life prisoner served as few as 7 years (the prisoner who served only 7 years had his sentence commuted in 1988). *See* Commonwealth Ex. No. 18, Stipulation regarding Testimony of Lisa Matteson and documents attached thereto. Indeed a review of the statistics from the year 1980 disclose one life

prisoner who served 9 years and 10 months (Inmate #10) and another who served 4 years (Inmate #16) before their sentences were commuted. On the basis of this record and in light of this evidence, the court cannot conclude that Manifesto's advice, based, as it may have been, on his legal experience and common sense, was so unreasonable as to fall below the threshold of a reasonably competent counsel. This is especially so if it is believed, as Manifesto testified, that 10-12 years was the *soonest* Eisen could expect to have his sentence commuted.

However, the court need not rest its conclusion on these grounds because Eisen's premise that Manifesto's advice was based merely upon his common sense and legal experience and "not upon any independent research, investigation or study of current statistics and public documents available from the Board of Pardons and elsewhere" (HP at 33), is refuted by the uncontradicted record. Manifesto testified that he contacted the Board of Pardons in relation to this case and that they forwarded to him a breakdown of people whose sentences had been commuted, although not with any differentiation among first degree homicide convicts, second degree homicide convicts who actually did the killing, and second degree homicide convicts who were not the killers. HT1 at pp. 20-21. In addition, Manifesto testified that he relied in part upon a Superior Court opinion by Judge Popovich which cited statistics regarding commutation, although he testified he could not recall the name of the case. In this regard the following exchange took place between PCRA counsel and Manifesto:

Q. Are you aware of how many persons have been commuted in the last 18 years in Pennsylvania, those that were sentenced to life imprisonment?

A. I know part of the research I came up with in preparing for this case, there was a decision by Judge Popovich in which he alluded to those records [i.e., commutation statistics for life sentenced prisoners] and I think the records I can't recall now what it was specifically, in my opinion are going to be that the average, which includes first degree murder, second, shooters, nonshooters, would probably average out to be somewhere between 18 and 20 years, and I would think that you have an opportunity to.

Q For what?

A For commutation, that you have an opportunity for the lower end of the range if you are further removed as the shooter. The actual number I honestly don't recall.

The Commonwealth asserted that the Superior Court decision by Judge Popovich referenced by Manifesto was *Commonwealth v. Szczeshiewski,* 591 A.2d 1055 (Pa. Super. 1991).[33] In fact that opinion is written by Judge Popovich and it does contain statistics for commuted life sentenced individuals. A review of those statistics indicate that it reveals the average time served by prisoners who had their sentences commuted was 19.1 years. That table

[33] See also PCRA H.T.2 at pp. 24-25 (Manifesto again references to Judge Popovich's opinion and the commutation statistics it contained).

also shows that the number of life sentenced prisoners who had their sentences commuted ranged from a high in 1980 of 16 (out of 848) to a low in 1987 of 0 (out of 1674). Certainly, this table provides a stark picture of the chances for commutation. Even in the best year the likelihood of commutation was roughly 0.018% (= 16 ÷ 848). Hence, Eisen simply has failed to meet his burden of establishing that Manifesto performed no research, or his burden of establishing that Manifesto's advice was based upon a mistaken view of the chances of commutation or of the minimum amount of time Eisen would have to serve before commutation. Eisen's allegation that Manifesto was unaware of the remote chance of commutation is simply not supported by the record. Indeed Manifesto testified that "They [i.e., commutations] are not granted easily." PCRA H.T. 7/18/96 at p. 64. Moreover, having failed to establish in the state courts this factual predicate for his claim of ineffectiveness, by adducing evidence that Manifesto was in fact unaware of the remote chance of commutation, Eisen is not now entitled to have a second chance to do so.

4. Advice Regarding Commutation

Petitioner's last claim of ineffectiveness challenges counsel's advice that Eisen plead guilty for an illusory chance of commutation. This court should conclude that the Superior Court's determination that Manifesto was not ineffective is not contrary to or an unreasonable application of federal law. Neither is it a decision based on an unreasonable determination of the facts in light of the evidence presented. For even the PCRA court found that "the sentencing exhibit certainly postures him [Eisen] in a better position for any future clemency than if it did not

exist," PCRA Court op. at p. 7, even though that court went on to add that "the tenuous benefit of the sentencing exhibit is not at all clear." *Id.*

The entire record of testimony compels the conclusion that Manifesto in fact considered the theories now advanced and the alternative courses of action, and their potential benefits and pitfalls, and advised intelligently if not infallibly (with the benefit of hindsight) as to a prudent course of conduct. This record simply does not establish Manifesto's ineffectiveness on any of the grounds alleged.

Because petitioner has failed to carry his heavy burden to show that he is entitled to federal habeas corpus relief, his petition should be denied.

G. Certificate of Appealability

The Antiterrorism and Effective Death Penalty Act included several major reforms to the federal habeas corpus laws. Section 102 of the Act (28 U.S.C. § 2253(c) (as amended)), codifies standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. Amended section 2253 provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." Petitioner has not made any showing that he has been denied any of his constitutional rights. Accordingly, a certificate of appealability should be denied.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that the petition for a writ of habeas corpus be dismissed, and that a certificate of appealability be denied.

In accordance with the Magistrates Act, 28 U.S.C. §636 (b) (1) (B) and (C), and Rule 7.2.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ Kenneth J. Bensen
KENNETH J. BENSEN
UNITED STATES
MAGISTRATE JUDGE

Dated: January 9, 2002

cc: Honorable Gary L. Lancaster
United States District Judge

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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 571 W.D. Allocatur Docket 1998
Respondent	: Petition for Allowance of Appeal from the Superior Court
v.	
ERIC L. EISEN,	
Petitioner	

ORDER

PER CURIAM:

AND NOW, this 1st day of December 1998, the petition for allowance of appeal is denied.

A True Copy Patricia Honard
As of: December 1, 1998
Attest: /s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

Commonwealth of Pennsylvania	:	
Appellant	:	
	:	No. 168 Pittsburgh 1997
v	:	
Eric L. Eisen	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby VACATED. Judgment of Sentence Reinstated.

BY THE COURT:

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: May 19, 1998

J. A02033/98

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ERIC L. EISEN,	:	No. 168 Pittsburgh, 1997

Appeal from the PCRA Order in the Court of Common Pleas of Allegheny County, Criminal Division, No. CC9302685, 9304232,

BEFORE: DEL SOLE, TAMILIA and BROSKY, JJ.

MEMORANDUM: FILED: May 19, 1998

The Commonwealth appeals from the December 31, 1996 Order granting appellee a new trial pursuant to the Post Conviction Relief Act (PCRA). 42 Pa.C.S. § 9541 *et seq.*

Appellee, Eric L. Eisen, pled guilty on May 23, 1994 to second degree murder,[1] robbery[2] and criminal conspiracy[3] pursuant to a negotiated plea agreement. Thereafter, appellee was sentenced to a life term of imprisonment. The record reveals neither a petition to withdraw the plea nor a direct appeal were filed in this case.[4] On December 28,

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[1] 18 Pa.C.S. § 2502(b).

[2] ***Id.***, § 3701.

[3] ***Id.***, § 903.

[4] Ordinarily, a defendant's failure to petition to withdraw his guilty plea, combined with failure to raise the issue on direct appeal

(Continued on following page)

1995, appellee filed a PCRA petition asserting several claims for review. Following an extensive hearing, the PCRA court determined it had failed to conduct a sufficient plea colloquy pursuant to Pa.R.Crim.P. 319(b), **Plea Agreements,** and concluded there was a "persuasive argument" appellee's guilty plea was unlawfully induced. (Slip Op., O'Toole, J., 2/13/97, p. 7.) The PCRA court awarded appellee permission to withdraw his guilty plea and a new trial pursuant to section 9543(a)(2)(iii) of the PCRA.[5]

The Commonwealth argues absent a finding of ineffective assistance on the part of appellee's plea and sentencing counsel, the PCRA court could not sustain appellee's petition for post-conviction relief on this issue.

Our review of a PCRA court grant of relief is "limited to a determination of whether the court's findings are supported by the record and are otherwise free of legal error. The findings of the post-conviction court will not be disturbed unless they have no support in the record."

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will bar a challenge to one's guilty plea in collateral proceedings. ***Commonwealth v. Young,*** 695 A.2d 414, 416 n. 4 (Pa. Super. 1997). We recognize the PCRA court, nevertheless, may have concluded said claim was properly before it as appellee had alleged counsel's ineffective assistance resulted in the defective plea. *See* ***Commonwealth v. Yager,*** 454 Pa. Super. 428, 685 A.2d 1000 (1996), *alloc. denied,* 701 A.2d 577 (Pa. 1997). Upon thorough review of the record, however, we find the claim lacks merit as there is no evidence of ineffective assistance of counsel on the part of William Manifesto, Esquire. To the contrary, the record reveals only exemplary counseling by Mr. Manifesto. We, therefore, question whether the exception as set forth in ***Yager*** was truly applicable to appellee's PCRA petition.

[5] Appellee's PCRA petition was filed prior to the effective date of the 1995 amendment to the PCRA which revised this section.

Commonwealth v. Patterson, 456 Pa. Super. 202, ___, 690 A.2d 250, 252 (1997) (citations omitted); *see also* ***Commonwealth v. McCord,*** 435 Pa. Super. 1, 644 A.2d 1206 (1994).

Upon careful review of the record, it is apparent the decision of the PCRA court must be reversed as it is predicated upon erroneous application of the PCRA. We reverse the PCRA court's award of a new trial based, not upon the Commonwealth's ineffective assistance of counsel argument but, upon the statutory and decisional law applicable to post-conviction relief in Pennsylvania. Nevertheless, the appellee's ineffective assistance of counsel claim is without merit. It is beyond question that trial counsel had a sophisticated and well-executed plan, negotiated with the district attorney, to minimize the risk of trial and to extract a document to provide serious consideration to a future pardon board for executive clemency.

Appellee completed and signed an extensive written plea colloquy in the presence and with the benefit of counsel, supported by his family, including his father, a prominent attorney, and a law firm associate who was a former assistant district attorney. Moreover, appellee testified in open court he understood the elements of and maximum sentence for the crimes for which he was pleading guilty, was not coerced or threatened into entering the plea and had no additions or modifications to offer to the Commonwealth's summary of the facts. Appellee conveyed his understanding of the charges against him and by every indication appeared to be fully aware of the possible consequences of the negotiated guilty plea agreement. By developing this evidence on the record, a sufficient colloquy was conducted by the sentencing court. *See* Comment to Pa.R.Crim.P. 319.

Through his PCRA petition, appellee asserted numerous arguments contending he was misled and/or deceived with respect to the function and application of the negotiated plea agreement's "Sentencing Exhibit".[6] The sentencing exhibit in question is identified by the Commonwealth as evidence of the Commonwealth's agreement not to oppose commutation for appellee at a later date. (Appellant's Brief, p. 21; *see also* S.T., 5/23/94, p. 6.) When asked whether he understood the Commonwealth's explanation of the sentencing exhibit in open court just prior to the court's judgment of sentence, appellee responded affirmatively (S.T. at 6-7). His assertion that he had not read the final proposal in the affidavit, which changed a small portion of the affidavit regarding the firing of the fatal shot being accidental as opposed to the co-defendant having his hand on the weapon, is totally inconsequential. Testimony elicited from original counsel at the PCRA hearing unequivocally established that even though appellee didn't read the revised affidavit, its content was thoroughly explained to him and family members and accepted as such. The failure of the trial judge to go over the affidavit in detail, in light of the intensive work by trial counsel to make clear the benefit of the affidavit and bargain to the appellee, is immaterial. The benefit achieved by the plea and incorporation of the affidavit to achieve favorable consideration (not a promise) for commutation in the future, and the risk of trial and possibility, if not likelihood, of a first degree murder verdict with any

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[6] While we recognize some small portions of appellee's PCRA petition do not directly challenge the sentencing exhibit, it is clear the thrust of appellee's PCRA argument and, as a result, the area of concentration by the PCRA court, is the sentencing exhibit issue.

prospect of commutation being seriously diminished, was the heart of the bargain accepted and achieved by appellee. The colloquy by the trial court elicited the response that appellee knew he was pleading guilty to second degree murder calling for a life sentence without parole. Anything else contained in the plea agreement was beyond the scope of the trial court to control and was designed to provide for a future unpredictable contingency that might redound to appellee's benefit. This was the bargain which was delivered and the trial court improperly faults himself for matters prearranged and committed by appellee, trial counsel, appellee's family and the district attorney. Appellee cannot now go back to square one having changed his mind a year and one-half later.

It is apparent upon review of both appellee's extensive PCRA petition and appellate brief, appellee became dissatisfied with his conviction and sentence. We note "[t]he law does not require that [the defendant] be pleased with the outcome of his decision to enter a plea of guilty." ***Commonwealth v. Yager,*** 454 Pa. Super. 428, ___, 685 A.2d 1000, 1004 (1996), *alloc. denied*, 701 A.2d 577 (Pa. 1997). In ***Commonwealth v. Moore,*** 439 Pa. Super. 48, 653 A.2d 24 (1995), *appeal dismissed*, ___ Pa. ___, 684 A.2d 122 (1996), this Court found a defendant's understanding of the authority of the Pennsylvania Board of Probation and Parole had no relevance to a fact-finder's assessment of that defendant's guilt or innocence and, therefore, failed to qualify for post-conviction relief. We find this holding applicable to the facts in the instant matter.

Appellee also bases his argument of an unlawfully induced plea on the fact that the co-defendant, who likewise received a plea bargained life sentence with an affidavit recommending clemency in any future pardon

consideration, gave statements as to the conspiracy and killing which had been "sanitized" in appellee's proceedings. He argued the fact these statements possibly would be available to a pardon board, might be detrimental to him in his future clemency motions thus allegedly creating an illegal colloquy and unknowing guilty plea. To accept this argument as did the PCRA court requires several leaps of unsupportable conclusions. First, the district attorney must have misrepresented the Commonwealth's position in the plea bargain. Second, the co-defendant and his counsel, in dealing with the district attorney, would have been presumed to give up their right to an "unsanitized" version of the homicide for purposes of co-defendant's affidavit directed to the pardon board for future consideration of clemency. Third, the trial court must be presumed to have been willing to accept less than a full colloquy (the sanitized version) thereby making it possible for him to accept the plea in good faith. None of these premises are credible and none go to the essential requirement of section 9543(a)(2)(iii), that is, "[a] plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused petitioner to plead guilty." It appears that the only party, if any, who was induced under the circumstances to accept the guilty plea was the judge, who now is willing to set aside the guilty plea because he was misled as to the possible effect of a co-defendant's affidavit. This we cannot accept.

A review of the record evidences appellee's articulated understanding of his plea's purpose and effect and is devoid of any language indicating inducement or incentive. This, coupled with extensive knowledge of trial counsel of other factors which would indicate premeditation and

previous criminal activities which could have been admissible to establish premeditation and a pattern of criminal conduct, belies lack of understanding of the purpose for the negotiated plea.

> THE COURT: Why are you pleading guilty, sir?
>
> THE DEFENDANT: Because I'm guilty of the crime. (S.T. at 19.)
>
> . . .
>
> THE DEFENDANT: Words alone are not enough to take away the sorrow, grief and pain that I have caused the Bostedo family. There is nothing I can do to comfort them. If it was at all possible, no matter what the cost, I would undo what happened that horrible night in February. For the rest of my life when I wake up, when I go to sleep I will think of Danny Bostedo. I feel remorse and know he is not here due in part to me. **I have owned up to my responsibility and am prepared to accept my punishment.** That's it, Your Honor.

Id. at 20 (emphasis added).

The trial court, in his Opinion, stated:

> It should be noted that [the] Commonwealth was not seeking the death penalty in this case and that therefore for the appellee to go to trial he would be in no worse shape being convicted by a jury of either first or second degree murder than he was pursuant to the plea agreement.

(Slip Op., O'Toole, J., 2/13/97, p. 6.) This is incorrect as the defendant, in addition to the charge of homicide, also was charged with and pled guilty to robbery and criminal

conspiracy, which at trial could have resulted in substantial additional sentences, possibly consecutive, rendering any possible clemency consideration inconceivable. By entering the negotiated plea to homicide, robbery and conspiracy, but being sentenced only on the homicide, the path was clear to provide a pre-orchestrated plan to commute the sentence in the event a more benevolent administration came into office in the years to come. The various statistical analyses employed by trial and PCRA counsel as to the likelihood of commutation do not alter the fact that the bargain provided some prospects for commutation which would be unavailing if there was a conviction, as most certainly would have occurred had there been a trial. In a further step, which is almost unprecedented, the appellee wrote a letter to the victim's family acknowledging that he was sorry for his actions and by pleading guilty sought to save them and his own family the agony of a trial. This letter was incorporated in the affidavit, which was to be submitted by the Commonwealth as part of the record, for consideration by a future commutation board.

Based upon this evidence and the sufficient colloquy conducted by the sentencing court, we find it clear appellee knowingly, voluntarily and intelligently entered his guilty plea. Whether appellee accurately understood the function, application and effect of the sentencing exhibit is immaterial to a fact-finder's determination of guilt or innocence. Moreover, the record is devoid of any evidence in support of appellee's argument he was deceived, misled or misinformed with respect to the sentencing exhibit. Based upon the foregoing, we find no basis for post-conviction relief.

The Order of December 31, 1996 is vacated and the May 23, 1994 judgment of sentence is reinstated.

Order vacated.

Judgment of sentence reinstated.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA — CRIMINAL DIVISION

vs. — NO. 168 Pgh 97

ERIC L. EISEN

OPINION

BY: Lawrence J. O'Toole, Judge

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OPINION

L. O'TOOLE, J.

The Commonwealth of Pennsylvania appeals from a Order of Court dated December 31, 1996 granting relief in the form of a new trial for the appellee Eric L. Eisen. Mr. Eisen filed for this relief under the Post Conviction Relief Act.

The facts that give rise to this litigation are as follows:

On February 8, 1993 at approximately 9:00 in the evening, North Fayette Township Police received a call for

shots fired near 50 Old Branch Road in North Fayette Township. Police Officer Mark O'Donnell was dispatched to this area and while investigating this noticed the vehicle of Mr. Eisen, a red Honda Prelude, which was occupied by the appellee and his co-defendant Mr. James Smith. The officer followed this vehicle which started to leave at a very high rate of speed. The Officer followed this vehicle and activated his emergency lights and the vehicle pulled over at the intersection of Lutz Road and Baten Road. When the Officer approached the vehicle and questioned Mr. Eisen, he noticed two pairs of gloves on the floor of the passenger side which appeared to have blood on them. The Officer also noticed smears of blood on the trunk of the vehicle and while continuing his observations he noticed there were indications of blood on both Mr. Eisen's clothes and Mr. Smith's clothes. The Officer ordered both occupants out of the car and shortly thereafter Mr. Eisen made an admission that there was a body in the truck [sic] of the vehicle. Indeed inside the trunk of the Honda Prelude was the body of the victim Daniel Bostedo. He was fully clothed, there was mud on the clothes, Two Hundred and Eighty-nine ($289.00) Dollars in his pocket, and Four Thousand ($4,000.00) Dollars folded and wrapped in his sock. The cause of death as recorded by the Coroners Office was a close range shotgun wound to the left neck. Death was instantaneous. In the truck [sic] along with the body of the victim was a twelve gage [sic] mosper pump action shotgun with one spent round. Both Mr. Eisen and Mr. Smith once in custody gave statements detailing their involvement to the Allegheny County Homicide Detectives. Both indicated that this was in fact a fairly detailed plan to rip off the victim on the part of Mr. Eisen and Mr. Smith. The plan in a nutshell was to meet Mr. Bostedo at a location in the City of Pittsburgh, Mr.

Eisen would be driving and Mr. Smith would be secreted in the truck [sic] of the car along with the shotgun. Mr. Eisen drove to what he believed to be an isolated and remote part of Allegheny County and as Mr. Eisen and Mr. Bostedo were walking up a path from the car, Mr. Smith exited the vehicle and pointed the gun a [sic] Mr. Bostedo. Shortly thereafter a single shot rang out and Mr. Bostedo was killed. The oral statements of the defendants both indicated that Mr. Bostedo tried to take some refuge behind Mr. Eisen, that Mr. Eisen pushed him away from him, and in that moment Mr. Smith indicates the gun went off and that Mr. Bostedo died immediately. The body was then dragged to the vehicle along with the shotgun and all this was placed in the truck [sic] of the car. Both indicated that there was an intent to rob him but there had been no intent to kill him.

A plea was entered on behalf of Mr. Eisen on May 23, 1994 before this Court. At the time of the plea it was indicated on the record that this was a plea agreement where Mr. Eisen would plead guilty to second degree murder and receive a sentence of life imprisonment. There was to be no penalty on the charge of robbery and conspiracy. Also, tendered as part of the plea agreement was a document titled "Sentencing Exhibit". This sentencing exhibit would document the facts of the plea and sentence and also a letter tendered by Mr. Eisen to the family of the victim that in recognition of saving the family of the victim the agony of trial and admitting his complicity that the exhibit would be used for whatever gubernatorial proceeding that might take place in the future. Mr. Eisen indicated on the record that he was cognizant of this plea agreement and that he agreed to it. The plea continued and Mr. Eisen was found guilty of second degree murder

and immediately sentenced to a term of imprisonment of life without parole. No direct appeal was taken from this judgment of sentence. Subsequently, a motion for post conviction collateral relief pursuant to the post conviction relief act was filed by Mr. Eisen on December 28, 1995. Mr. Eisen, the appellee, indicated a number of points that he felt would support his application for relief under the post conviction relief act. Among those was that counsel was ineffective for a variety of reasons in his stewardship of this case and that the court failed to comply with Pennsylvania Rules of Criminal Procedure 319b which requires that the court conduct a thorough inquiry into the terms of the plea agreement and to ascertain whether the defendant fully understands and concurs in the terms of the agreement. The court scheduled hearings on the petition filed by the appellee. Extensive hearings were conducted on July 19, 1996 and also on November 14, 1996. A number of witnesses testified including counsel for the appellee at trial, various family members of the appellee and a former district attorney who was assisting Mr. Eisen on an informal basis in his defense. Much of the testimony of the hearing was an attack on the stewardship of trial counsel. In addition, there was a great amount of testimony dealing with the import of what it was Mr. Eisen was receiving pursuant to this sentencing exhibit. The appellee testified that it was his understanding that he would be eligible and in fact would receive commutation after a period of approximately ten to twelve years. Trial counsel indicated that there was never any particular promise in terms of a number of years made to his client but did detail his efforts to try to get Commonwealth to agree to a plea of third degree murder. The other witnesses called by both Mr. Eisen and by the Commonwealth essentially testified about and concerning the same

matter. It is abundantly clear that subsequent to this plea there was a great degree of confusion as to precisely what it was Mr. Eisen was to receive. It is plain to this court that under the unique facts in this plea agreement it was error on the part of the court not to get the appellee, Mr. Eisen's, understanding of what it was he was receiving. The language used by the District Attorney was broad and was suggested in a general way what was sought to be accomplished by the plea agreement. However, in light of the subsequent testimony this court heard and the observations made of the various witnesses on behalf of both appellee and the Commonwealth, it is this court's conclusion that the court erred when it did not comply strictly with Rule 319b and do a thorough and complete colloquy as to Mr. Eisen's on the record understanding of precisely what it was he was to receive. The purpose of Rule 319b is to insure that all terms of the quid pro quo are openly acknowledged on the record.

This litigation is in the posture of a petition for relief under the post conviction relief act pursuant to Title 42 Pa. C.S. Section 9543 A.2d this court finds that the appellee has established his plea of guilty was unlawfully induced where the circumstances made it likely that the inducement caused him to plead guilty. It should be noted that Commonwealth was not seeking the death penalty in this case and that therefore for the appellee to go to trial he would be in no worse shape being convicted by a jury of either first or second degree murder than he was pursuant to the plea agreement. Obviously the sentencing exhibit had to have had some value in the mind of the appellee for him to engage in this understanding. Given the subsequent record it is obvious that the appellee would not have entered a plea under these circumstances pursuant to a

sentencing exhibit unless he felt there was some distinct value to be obtained. It should be noted that the record contains an analysis of gubernatorial commutations and it would appear unlikely this Defendant would receive any relief for at least several decades. While it is clear that the sentencing exhibit certainly postures him in a better position for any future clemency than if it did not exist the tenuous benefit of the sentencing exhibit is not all clear. However, it is a case such as this that this court beliefs [sic] requires a strict application of Rule 319b and that the failure of the court to do so gives rise to a persuasive argument that this appellee's plea of guilty was in fact unlawfully induced. Thus relief in the form of a new trial is granted pursuant to Tit. 42 Sec. 9543 (A) (2) (iii). ***Commonwealth v. Edwards, 612 A.2d 1077 (1992)***.

/s/ _____ J.
BY THE COURT

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2230

ERIC I. EISEN,

Appellant

v.

MARTIN HORN; Commissioner Pennsylvania Department of Corrections
RAYMOND SOBINA, Warden, State Correctional Institution at Somerset

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-cv-001624)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, *Chief Judge*,
SLOVITER, NYGAARD, ALITO, ROTH, MCKEE,
BARRY, AMBRO, FUENTES, SMITH, and
STAPLETON, *Circuit Judges*[1]

The Petition for rehearing filed [sic] the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked

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[1] Judge Stapleton's vote is limited to panel rehearing only.

for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ _____ J.
United States Circuit Judge

DATE: JUN 26, 2003

tyw/cc: JBL
CMR
DR
RDS
RMW